Supreme Court, U.S.
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No. 85-1878

IN THE

Supreme Court Of The United States

October Term, 1985

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY; BOARD OF TRUSTEES OF ALABAMA A&M UNIVERSITY; JOHN KNIGHT, *et al.*; and NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA; TROY STATE UNIVERSITY; ALABAMA STATE BOARD OF EDUCATION; and GEORGE WALLACE, GOVERNOR OF ALABAMA
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT AUBURN UNIVERSITY

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111 pgs.

QUESTIONS PRESENTED

1. Do the issues of fact and law in this case justify a grant of certiorari prior to a decision by the court of appeals?

2. Does the district court's decision have "sufficient indicia of finality" so as to be appealable under 28 U.S.C. § 1291?

3. Does the district court's decision requiring the submission of a plan to eliminate the alleged vestiges of segregation in Alabama's public colleges and universities so specify the nature or extent of the relief which the plan would afford as to make the decision appealable under 28 U.S.C. § 1292 (a) (1) ?

4. Was it appropriate for the court of appeals to stay proceedings relative to the adequacy of the desegregation plans submitted by the Governor of Alabama, the Alabama Public School and College Authority and the Alabama Commission on Higher Education?

PARTIES

The petitioners are Alabama State University ("ASU"), Alabama A&M University ("A&M"),[1] the Knight-Intervenors[2] and the "Normalite Association."[3] The United States, the lead plaintiff in the district court, has not joined in the Petition for Writ of Certiorari.

Auburn University and its Board of Trustees ("Auburn"), the other public institutions of higher education in Alabama and their respective Boards of Trustees and several Alabama education authorities were defendants below.[4]

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[1]Contrary to their assertion that they make claims on behalf of their students, Alabama State University ("ASU") and Alabama A&M University ("A&M") sought and were granted realignment as plaintiffs in the district court on the basis that they, as state institutions, had rights that had been violated by the defendants. *See* Appendix pp. A-1-A-6, A-7-A-8. The United States Court of Appeals for the Eleventh Circuit has held in a related appeal that state institutions of higher education do not have the rights claimed by A&M and ASU as the basis for their realignment. *See United States v. State of Alabama,* Slip Op. 85-7582 (11th Cir. June 6, 1986) at _____. (Appendix pp. A-82-A-83).

[2]The Knight-Intervenors are a class represented by students, alumni, faculty and administrators of ASU, certified as consisting of graduates of ASU and black citizens of Alabama who are eligible for employment by or who attend or may attend public institutions of higher education in the Montgomery, Alabama area. Their claims are expressly restricted to the desegregation of public higher education in Montgomery, Alabama. The petition for certiorari incorrectly implies that the class asserted statewide claims. *See* Appendix A-11-A-13.

[3]The Normalite Association is an A&M alumni group, which sought intervention for the stated purpose of maintaining A&M's "identity as a predominantly black institution." *See* Appendix pp. A-16-A-17. Only limited intervention, to comment on any desegregation plan presented, was granted. The petition for certiorari incorrectly characterizes the extent and nature of this intervention. *See* Appendix pp. A-20-21.

[4]The defendants below included the other public institutions of higher education in Alabama: The University of Alabama, Jacksonville State University, the University of North Alabama, Troy State University, the University of South Alabama, Livingston University and the University of Montevallo; the State of Alabama, its Governor, the Alabama State Board of Education, the Alabama Public School and College Authority ("APSCA"), and the Alabama Commission on Higher Education ("ACHE"). Claims were also asserted with reference to Auburn University in Montgomery ("AUM"), the University of Alabama in Huntsville ("UAH") and the University of Alabama in Birmingham ("UAB").

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STATEMENT OF THE CASE

The plaintiffs allege that the State of Alabama, its Governor, three of its agencies and a number of independently governed public institutions of higher education have failed to eliminate the vestiges of segregation by (1) failing to enhance two predominantly black institutions to make them equal in status to Auburn University and the University of Alabama, the two major research and doctoral level institutions of higher education in the state;[5] (2) failing to achieve a particular racial balance in faculty and enrollment of various institutions; and (3) creating and operating branch campuses of Auburn University and the University of Alabama in the same cities as Alabama A&M University and Alabama State University, respectively.

The Complaint, filed by the United States on July 11, 1983, alleges that, based upon an investigation of higher education in Alabama, the United States Department of Education found that the State of Alabama was in violation of Title VI because of an alleged failure to eliminate the vestiges of a formerly racially dual system of higher education.[6]

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[5]The evidence was that in terms of capital resources, finances for operations and academic program offerings, A&M and ASU were treated as well as or better than Jacksonville State University, the University of North Alabama, Troy State University, Livingston University, the University of Montevallo and AUM, which are the other state-supported institutions of higher education with degree levels and enrollment similar to those of ASU and A&M.

[6]Specifically, the Complaint alleges that "prior to 1953, the State of Alabama established and maintained a racially dual system of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education." The Complaint alleges that the enrollment, faculty and staff and governing boards of each of the institutions of higher education are still identifiable by race and that in Montgomery, Alabama and Huntsville, Alabama the existence of AUM and UAH, in close proximity to ASU and A&M, respectively, impedes the ability of those traditionally black institutions to desegregate. Finally, the Complaint alleges that the State has discriminated in favor of Auburn and against A&M by selecting Auburn, and not A&M, to be the recipient of the bulk of the State's share of federal financial assistance for agricultural research and instruction.

There was no allegation in the Complaint, nor any evidence at trial, that any of the defendant institutions of higher education had denied admission to any student on the basis of race since 1967. Two of the institutions of higher education, the University of South Alabama and Auburn University at Montgomery ("AUM"),[7] were created in 1963 and 1967, respectively, and have never been racially restricted in any respect. The creation of AUM was sanctioned in *Alabama State Teachers Assn. v. Alabama Public School and College Authority*, 289 F. Supp. 784, *aff'd*, 393 U.S. 400 (1969), when this Court affirmed a three-judge court's rejection of the claims of a group of plaintiffs affiliated with ASU that the creation and operation of AUM would impede the desegregation of ASU.

After two years of intensive discovery and other pretrial matters, the trial on the merits began on July 1 and concluded on August 2, 1985. The reporters' transcript is 8,042 pages in length, and over 1,700 exhibits were introduced. Contrary to the petitioners' assertions, evidence was presented on remedial questions; including the issue of restricting AUM's institutional mission and program offerings, allegedly for the purpose of facilitating the desegregation of ASU; the feasibility of fragmenting Alabama's Agricultural Experiment Station and Cooperative Extension Service; the alleged need for additional State funding of A&M and ASU in order to enhance their attractiveness to white students; and the possible ingredients of plans to eliminate the vestiges of segregation in higher education.

On December 9, 1985, the district court entered a 99-page order and opinion that identified each vestige of segregation it found to exist in Alabama's colleges and ordered that the Governor, the Alabama Public School and College Authority ("APSCA") and the Alabama Commission on Higher Education ("ACHE") submit a plan to eliminate each vestige by enhancing the predominantly black institutions and diverting resources from the other institutions.[8]

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[7]AUM currently has an 18% black enrollment.

[8]The district court decision identifies with specificity the conditions and practices that allegedly offend the Constitution and states why each

Auburn University[9] and the University of Alabama filed notices of appeal on February 5, 1986. On February 7, 1986, Auburn moved in the district court for a stay of further proceedings, and upon failure of the district court to act on the motion, motions for a stay were filed in the court of appeals on February 13, 1986. The court of appeals issued orders staying proceedings in the district court on February 14, 1986, the date scheduled for the submission of a plan in accordance with the district court's decision. However, notice of the stay reached the parties after one plan had been filed by the Governor and APSCA and another by ACHE. Each of the petitioners filed motions in the court of appeals to dissolve the stay and to dismiss the appeals on the grounds asserted in their Petition for Writ of Certiorari in this Court.[10] The motions to dismiss the appeals have not yet been ruled upon by the court of appeals, but the motions to dissolve the stay have been denied.[11]

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is offensive. The district court made at least eight findings with respect to vestiges that affect Auburn and AUM, including: (1) that the Alabama Constitution's provisions for governance of Auburn University and the University of Alabama by independent Boards of Trustees are vestiges of segregation; (2) that the assignment of responsibility to Auburn, and not A&M, to manage and operate Alabama's Agricultural Experiment Station and Cooperative Extension Service is unconstitutional; (3) that Auburn's use of the American College Testing Program's ACT test as an admissions criterion is unconstitutional; (4) that Auburn does not actively recruit blacks for faculty positions; (5) that there is needless duplication of education and business programs offered by AUM and ASU that unconstitutionally impedes the desegregation of ASU; (6) that the races of the chief executive officers of Alabama public institutions of higher education are vestiges of segregation; (7) that Alabama's choice of resource allocation for facilities from 1965 to 1983 failed to enable ASU and A&M to attract white students; and (8) that Alabama's allocation of financial resources for the operation of its state universities has caused A&M's and ASU's student bodies to remain segregated.

[9]*See* Appendix p. A-22.

[10]The United States did not object to the stay orders issued by the court of appeals, and it has not moved to dismiss the appeals.

[11]In August, 1985, after the conclusion of the trial but before the entry of the opinion and order on the merits, the district court entered an order enjoining the State Board of Education from refusing to certify ASU's teacher education programs because of ASU's failure to comply with State Board of Education regulations concerning accreditation and certifi-

SUMMARY OF ARGUMENT

The petitioners' request for writ of certiorari should be denied because: (1) the facts and circumstances of this case do not warrant a grant of a writ of certiorari before judgment in the court of appeals; (2) the district court's decision has "sufficient indicia of finality" to render it appealable under 28 U.S.C. § 1291; (3) the district court's order that the Governor, ACHE and APSCA prepare a plan consistent with its opinion specifies the scope of relief sufficiently to render it appealable as an injunction under 28 U.S.C. § 1292(a)(1); and (4) the court of appeals' stay of proceedings in the district court is justified by the respondents' likelihood of success on the merits, the danger of irreparable harm to the respondents, the public interest and the absence of any danger of irreparable harm to the petitioners.

ARGUMENT

I. The Petition For A Writ of Certiorari Is Premature.

Petitioners have requested a grant of certiorari pursuant to 28 U.S.C. § 1254(1), which provides that "[c]ases in the court of appeals may be reviewed by the Supreme Court . . . by writ of certiorari granted upon the petition of any party . . . before or after rendition of judgment or decree . . . ." However, certiorari is rarely granted prior to judgment in the court of appeals and

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cation. That injunction has been reviewed by the court of appeals in a separate appeal, Case No. 85-7582. That appeal shares at least one issue common to the present case, whether a state university is endowed with substantive rights under Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the Fourteenth Amendment. The court of appeals held in Case No. 85-7582 that ASU does not have such rights and reversed the trial court's decision as to ASU and its Board of Trustees. *See* Appendix pp. A-79-A-92. Although the court of appeals left the injunction intact as to the Knight Intervenors, it did so on the grounds that the State Board of Education had not challenged the standing of the Knight Intervenors on appeal, *see* Appendix at A-81, 86, and that the injunction was necessary to maintain the status quo "so as to preserve the court's ability to render a meaningful decision on the merits." *See* Appendix at A-91.

this Court's rules of procedure provide that certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellant practice and to require immediate settlement in this Court." Sup. Ct. R. 18. Cases involving conflicts between the executive and judicial branches of the federal government, *United States v. Nixon*, 418 U.S. 683 (1974); conflicts between the United States or its citizens and foreign governments, *see Wilson v. Girard*, 354 U.S. 524 (1957); and other cases of *urgent, national* importance, *see, e.g., United States v. United Mine Workers*, 330 U.S. 258 (1947), and *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), have been held to justify review by this Court prior to judgment in the court of appeals.

The case under consideration is of great importance, but there is no imminent, irreparable threat to the national government or to individual constitutional rights as to require *immediate* review by this Court. This is not a case where the governing legal principles have been clearly defined in this Court. Although the issue is stated to be desegregation, it actually involves the question of long-term enhancement to institutions, not the assignment of students. The evidence at trial was undisputed that no defendant institution has denied admission to any person on the basis of race since 1967, and that over 60% of the black students who attend public colleges in Alabama attend the defendant institutions. This case involves the alleged constitutional rights of State institutions of higher education, not of students.

The number of issues and the size of the record compel review by the court of appeals prior to review by this Court. Auburn's assignments of error as to the district court's decision include: (1) whether the district court erred in assigning responsibility for the development of a desegregation plan for Auburn to an entity other than Auburn's Board of Trustees, which has sole authority for its management and control under the Alabama Constitution of 1901 and Ala. Code § 16-48-2 (1975); (2) whether *Alabama State Teachers Association v.*

Alabama Public School and College Authority, 289 F.Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969), is *res judicata* as to the constitutionality of the establishment and operation of AUM; (3) whether A&M and ASU, which are instrumentalities of the State of Alabama, may invoke the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964 against the State; (4) whether the Knight Intervenors or the United States may invoke such rights on behalf of A&M and ASU; (5) whether the Office for Civil Rights of the United States Department of Education followed its own operating procedures in conducting its 1978 higher education investigation, which was a prerequisite to the filing of this action by the United States; (6) whether the district court had jurisdiction to entertain claims relating to State agricultural research and extension agencies that receive federal financial assistance administered by the United States Department of Agriculture, which has not made any finding of violation of Title VI of the Civil Rights Act of 1964 with respect to those agencies; (7) whether the district court erred in finding that the defendants had violated Title VI of the Civil Rights Act of 1964 in the absence of violations in any specific institution or in specific programs receiving federal financial assistance; (8) whether the district court clearly erred in finding that Auburn's use of the ACT test as an admissions criterion violated the Constitution; (9) whether the trial court erred in holding that A&M and ASU had been discriminated against in the allocation of financial resources by comparing those institutions to Auburn University and the University of Alabama rather than to State institutions of similar size and mission; (10) whether the trial court clearly erred in holding that governance of Auburn University and the University of Alabama was provided for in the Alabama Constitution of 1901 for racially discriminatory reasons, and (11) whether the district judge should have been disqualified on the grounds of bias and extrajudicial knowledge of disputed evidentiary facts.

II. The Decision Of The District Court Is Appealable Pursuant to 28 U.S.C. § 1291.

The petitioners' argument that the district court's decision is not final assumes, without analysis, its conclusion — that the district court's decision "does no more than find liability." In fact, the decision from which Auburn appeals does far more than merely find liability; it decides everything except the details of implementing its decision.

The district court's order effectively ends Auburn's participation in the litigation as a matter of right by limiting Auburn's involvement to comment on a plan submitted by others. In contravention of settled precedent from this Court, *e.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974), and *Brown v. Board of Education*, 349 U.S. 294 (1955), and in disregard of the Alabama Constitution, the district court assigned the responsibility for the development of a desegregation plan for Auburn to the Governor, ACHE and APSCA rather than to the Auburn University Board of Trustees. Under Article XIV, § 266 and Amendment 161, *Alabama Constitution* (1901), the management and control of Auburn University are vested exclusively in its Board of Trustees. The Alabama Supreme Court has held that the management and control of Auburn University and the University of Alabama are beyond the authority of ACHE, a creature of the Legislature, and by extension APSCA and the Governor,[12] because of the Alabama constitutional provisions for autonomous boards of trustees at those universities. *Opinion of the Justices*, 417 So. 2d 946 (Ala. 1982).

The district court's findings leave little doubt that the court intends to restructure the Alabama Legislature's designations

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[12]APSCA, also a statutory entity, is a public corporation the sole function of which is to issue bonds to finance capital outlay needs. It has no powers of governance of public higher education. Ala. Code, §§ 16-16-1, *et seq.* (1975).

The Governor and the State Superintendent of Education are *ex officio* members of Auburn's Board of Trustees. There are ten other trustees, each of whom serves for a 12-year term. Amendment 161, *Alabama Constitution* (1901). Except as one of twelve trustees, the Governor has no authority to manage Auburn.

of responsibility for agricultural research and extension, to direct funds for those activities away from Auburn and toward A&M and to abolish Auburn's requirement of a minimum score on the ACT test for unconditional admission as an entering freshman. Its finding that specific academic programs at AUM and UAH unnecessarily duplicate allegedly similar programs at ASU and A&M, respectively, and have a "negative impact" on white enrollment at the predominantly black institutions leaves little question as to the future of those programs at UAH and AUM.

The district court order so restricted the discretion of those ordered to submit a plan to remove the vestiges of segregation that it reduced the submission of the plan to a ministerial task. The district court found that vestiges existed in every area alleged by any plaintiff and granted the relief requested by the petitioners when it indicated that the remedy for these vestiges must be the enhancement of A&M and ASU to the detriment of other state-supported institutions.[13] Assuming that the district court allowed the Governor, APSCA and ACHE some flexibility in determining how this enhancement would be effected, that flexibility does not make the decision unappealable under 28 U.S.C. § 1291. *See Brown Shoe Company, Inc. v. United States,* 370 U.S. 294 (1962); *Morales v. Turman,* 535 F.2d 864 (5th Cir. 1976), *rev'd on other grounds,* 430 U.S. 322 (1977) (affirming on the issue of appealability); *Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 419 U.S. 1108 (1975); *Thoms v. Heffernan,* 473 F.2d 478 (2d Cir. 1973), *vacated on other grounds,* 418 U.S. 908 (1974).[14]

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[13]The racial identity of A&M and ASU as black colleges was the primary vestige of segregation relied upon in the presentation of the plaintiffs' case. Paradoxically, the district court ordered enhancement of these institutions without any provision for racially integrating them. Thus, the district court order keeps them separate but strives to make them more than equal to the other institutions.

[14]That the district court did not intend its decision to be appealable is not conclusive of this issue. *Compare United States v. Brown Shoe Co.,* 179 F. Supp. 721, 742 (E.D. Mo. 1959) *with Brown Shoe Co. v. United*

III. The Decision Of The District Court Is Appealable Pursuant to 28 U.S.C. § 1292(a)(1).

If the decision of the district court were deemed not to have "sufficient indicia of finality" to render it appealable under 28 U.S.C. § 1291, it nevertheless specifies the nature and extent of the relief to be afforded by an acceptable plan so as to be an interlocutory and mandatory injunction appealable under 28 U.S.C. § 1292(a)(1).

In *Board of Public Instruction v. Braxton*, 326 F.2d 616 (5th Cir. 1964), the United States Court of Appeals for the Fifth Circuit held that the order of the United States District Court for the Middle District of Florida requiring a county school board to submit a plan designed to eliminate segregation in the county's schools was a mandatory injunction appealable pursuant to 28 U.S.C. § 1292(a)(1) because it ordered that the plan submitted provide for the elimination of five specific practices the district court found to be unconstitutional. *See* 326 F.2d at 617, n.1, 619. The order of the court below was no less specific when it ordered that the plan submitted eliminate all vestiges of the prior dual system of higher education in Alabama, consistent with the findings in, and inferences from, its 99-page opinion. "[T]he ordering of the plan dealing expressly with these prohibited acts amounts to a mandatory injunction" appealable pursuant to 28 U.S.C. § 1292(a)(1). *Braxton*, 326 F.2d at 619. *See also Morales v. Turman*, 535 F.2d 864, 867, n.6 (5th Cir. 1976), *rev'd on other grounds*, 430 U.S. 322 (1977).[15]

States, 370 U.S. 294, 308 (1962); *see also United States v. Western Electric*, 777 F.2d 23, 28 (D.C. Cir. 1985) (noting that decision of district court in *Morales v. Turman* "purports to be nonfinal.").

[15]The cases cited by the petitioners are in accord with the Fifth Circuit's decisions in *Braxton* and *Morales*. *See Spates v. Manson*, 619 F.2d 204, 209-210 (2d Cir. 1980) (although purporting to express no opinion as to the validity of *Braxton*, the court recognized that an order is appealable "when the content of the plan to be submitted has already been substantially prescribed by the district court"); *Hoots v. Commonwealth*, 587 F.2d 1340, 1349-1350 (3d Cir. 1978); *Frederick L. v. Thomas*, 557 F.2d 373, 380-81 (3d Cir. 1977). In *United States v. Western Electric*,

IV. The Court Of Appeals' Stay Of Proceedings In the District Court Is Appropriate.

The petitioners' argument that the court of appeals' stay of proceedings in the district court was improvidently granted is based upon an assertion that school desegregation cases present a special situation in which stays may never be granted.[16] In support of this proposition, petitioners cite several cases which either dissolve or deny stays because, under the particular circumstances of those cases, the movant for the stay failed to satisfy the requirements of demonstrating a substantial case on the merits and showing that the balance of the equities weighs heavily in favor of granting the stay. *See Ruiz v. Estelle,* 650 F.2d 555 (5th Cir. 1981); *cert. denied,* 460 U.S. 1042 (1981). The cases cited by petitioners deny or dissolve the stays in question for a variety of reasons, none of which is that stays are necessarily inappropriate in school desegregation cases.

Stays have, in fact, been approved by this court in school desegregation cases. In *Corpus Christi School District v. Cisneros,* 404 U.S. 1211 (1971) (Black, J., Circuit Justice), Justice Black reinstated a stay granted by the district court, which had been dissolved by the Fifth Circuit Court of Appeals, in part on the ground that the merits of the case presented questions which had not theretofore been passed on by the Supreme Court or the United States Court of Appeals for the Fifth Circuit. In *Columbus Board of Education v. Penick,* 439 U.S. 1348 (1978) (Rehnquist, J., Circuit Justice), Justice Rehnquist granted a stay on the grounds that the court of appeals

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777 F2d 23 (D.C. Cir. 1985), the District of Columbia Circuit distinguished *Morales,* on the ground that the order before it disposed of no issues in the case and did not demonstrate "that the district court has made up its mind." 777 F.2d at 28. The decision of the district court in the case at bar clearly demonstrates that the district court has "made up its mind." Formulation of the administrative details for the implementation of the decision would add little or nothing to the definition of the issues on appeal. *See Frederick L.,* 557 F.2d at 380-81.

[16]If there is jurisdiction of Auburn's appeal under 28 U.S.C. § 1291, a stay order is unnecessary because the notice of appeal automatically divested the district court of jurisdiction.

had misinterpreted an earlier opinion of the Supreme Court and that, because of the drastic and wide-ranging relief ordered, the balance of the equities favored a stay.

The district court's decision here would force drastic changes in the academic policies, programs and reputation of Auburn and the other respondents. The threat of these changes as well as the district court's unsupported rhetoric regarding black student participation in campus life at Auburn and Auburn's racial attitudes seriously handicap ongoing efforts to recruit qualified black students and faculty members. Once these potential students or faculty members have chosen another institution, they may be lost to Auburn forever. The district court's findings relative to the racially discriminatory intent behind Auburn's constitutional independence from the Alabama Legislature could seriously erode the ability of Auburn's Board of Trustees to conduct business, manage academic affairs and direct educational policy.

The district court's decision has caused irreparable harm to Auburn because of the fears of current and prospective students that the institution in which they matriculate may not be the same institution from which they graduate. The difficulty of returning an organization ordered to be altered drastically to its former status has been considered an important factor in determining whether a stay pending appeal should be granted. *See, e.g., Columbus Board of Education v. Penick,* 439 U.S. 1348 (1978) (Rehnquist, J., Circuit Justice); *International Boxing Club v. United States,* 2 L.Ed. 2d 15, 78 S.Ct. 4 (1957) (Harlan, J., Circuit Justice); *cf. United States v. First National City Bank,* 386 U.S. 361, 370-71 (1967) (construing stay provision of Bank Merger Act of 1966, 12 U.S.C. § 1828 (c) (7) (A)). Preservation of the status quo pending appeal will not harm the plaintiffs or the public interest in the event the district court's decision is affirmed. Review prior to the initiation of expensive discovery and hearings concerning the elements of a plan to implement the district court's decision might avoid the expenditure of public funds on unnecessary litigation. The balance of the equities clearly favors a stay.

An important factor in determining the propriety of the stay, Auburn's likelihood of success on the merits, was extensively briefed in the court of appeals in support of its motion to stay. *See* Appendix pp. A-45 *et. seq.* Petitioners, however, are completely silent on this point. As demonstrated in the stay petition, the district court's opinion is fundamentally erroneous, and a stay of the order pending appeal is appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
VS.	)	CASE NO. CV-83-C-1676-S
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia,* that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama

State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,
GRAY, SEAY & LANGFORD
By: /s/ SOLOMON S. SEAY, JR.

Solomon S. Seay, Jr.
352 Dexter Avenue
Montgomery, Alabama 36104
(205) 269-2563
Attorney for Board of Trustees
for Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of the same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

Ira Dement
Dement & Wise
P. O. Box 4163
Montgomery, Alabama 36101

FOR: George C. Wallace
The Alabama Commission on Higher Education
The State of Alabama
The Alabama Public School and College Authority

Glenn Powell
P. O. Box 295
Tuscaloosa, Alabama 35401
and
Paul Skidmore
P. O. Box 6233
University, Alabama 35486

FOR: The University of Alabama

Charles Coody
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, Alabama 36130

FOR: Wayne Teague
Alabama State Board of Education

Thomas Thagard
P. O. Box 78
Montgomery, Alabama 36101
and
Edward Allen
Balch, Bingham, Baker, Ward, Smith, Bowman & Thagard
P. O. Box 306
Birmingham, Alabama 35201

FOR: Auburn University

Walter Merrill
500 First National Bank Building
Anniston, Alabama 36201

FOR: Jacksonville State University

J. Frederic Ingram
William F. Murray, Jr.
Thomas, Taliaferro, Forman, Burr & Murray
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203

FOR: Livingston University

Joe R. Whatley, Jr.
Donald W. Stewart
Stewart, Falkenberry & Whatley
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Birmingham, AL 35203

FOR: Alabama A&M University

Richard F. Calhoun
P. O. Box 965
Troy, Alabama 36081

FOR: Troy State University

Frank Ellis, Jr.
P. O. Box 587
Columbiana, Alabama 35051

FOR: The University of Montevallo

Robert Potts
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Florence, Alabama 35630

FOR: The University of North Alabama

Maxey Roberts
The University of South Alabama
Mobile, Alabama 36688

FOR: The University of South Alabama

William Bradford Reynolds
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Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Section
Civil Rights Division
Department of Justice
Washington, D. C. 20530

/s/ SOLOMON S. SEAY, JR.

EXHIBIT 1

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U. S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education; and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirms the position that the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H.B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and the Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

Agenda Item # 6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CASE NO.
	)	CV 83-C-1676-S
THE STATE OF ALABAMA, et al.,	)	
	)	
Defendants	)	

MOTION TO REALIGN OR IN THE ALTERNATIVE
FOR LEAVE TO FILE CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby moves to be realigned and treated as a party-plaintiff based on the following:

1. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, it has been denied its fair share of the capital and operation funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

2. Likewise, the allegations of the Second Claim demonstrate discrimination against and damage to Alabama A & M. The University of Alabama in Huntsville (hereinafter "UAH") was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability

of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions in North Alabama, while leaving Auburn with those functions in South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

3. The claims of Alabama A & M are brought under 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution with subject matter jurisdiction under U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq*. In addition to the relief requested herein and the original Complaint, Alabama A & M requests the award of attorney's fees and such other relief as may be appropriate.

4. Alternatively, Alabama A & M moves for leave to file the cross claims attached hereto.

Respectfully submitted,

STEWART, FALKENBERRY
& WHATLEY
Suite 305, 2100 16th Avenue
South
Birmingham, AL 35205
(205) 933-0300

By /s/ JOE R. WHATLEY, JR.

Joe R. Whatley, Jr.

/s/ DONALD W. STEWART

Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on the following by depositing same in the U. S. Mail, postage prepaid, on this 25th day of July, 1983:

Ira Dement, Esquire
Dement & Wise
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Montgomery, AL 36101

For: George C. Wallace
The Alabama Commission on Higher Education
The State of Alabama
The Alabama Public School and College Authority

Glenn Powell, Esquire
P. O. Box 295
Tuscaloosa, AL 35401

For: The University of Alabama

Charles Coody, Esquire
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, AL 36130

For: Wayne Teague
Alabama State Board of Education

Solomon Seay, Jr., Esquire
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For: The Board of Trustees for Alabama State University

Thomas Thagard, Esquire
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For: Auburn University

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For: Jacksonville State University

Fred Ingram, Esquire
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For: Livingston University

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For: Troy State University

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For: The University of Montevallo

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For: The University of North Alabama

Maxey Roberts, Esquire
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For: The University of South Alabama

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Thomas M. Keeling
Harvey L. Handley, III
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General Litigation Section
Civil Rights Division
Department of Justice
Washington, DC 20530

/s/ JOE R. WHATLEY, JR.

Joe R. Whatley, Jr.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	CV 83-C-1676-S
	)	
THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; THE BOARD OF TRUSTEES FOR ALABAMA A&M UNIVERSITY, a public corporation; AUBURN UNIVERSITY, a public corporation; JACKSONVILLE STATE UNIVERSITY, a public corporation; LIVINGSTON UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE UNIVERSITY OF MONTEVALLO, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA; a public corporation; THE UNIVERSITY OF NORTH ALABAMA, a public corporation; THE UNIVERSITY OF SOUTH ALABAMA, a public corporation; THE ALABAMA COMMISSION ON HIGHER EDUCATION; and THE ALABAMA	)	

PUBLIC SCHOOL AND COLLEGE)
AUTHORITY,)
)
Defendants.)

MOTION TO INTERVENE

John F. Knight, Jr., Catherine Coleman, Charles R. Anderson, John T. Gibson, Alma S. Freeman, through their undersigned counsel, pursuant to Rule 24, Fed.R.Civ.P., move to intervene in this action as parties plaintiff, on behalf of themselves and on behalf of the class they purport to represent. As grounds for their motion, Petitioners would show as follows:

1. Petitioners are the named plaintiffs in the civil action pending in the United States District Court for the Middle District of Alabama styled *Knight v. Wallace,* Civil Action No. 82-52-N (M.D.Ala.). Said action challenges the failure of the State of Alabama to eliminate the vestiges of prior *de jure* racial segregation in the four-year institutions of higher learning in Montgomery, Alabama. The Complaint in *Knight v. Wallace* is substantially the same as the proposed intervenors' complaint attached to this motion.

2. All of the defendants in *Knight v. Wallace* are, in their official capacities, defendants in the instant action as well. They are the Governor of the State of Alabama, the State Superintendent of Education, the members of the Board of Trustees for Alabama State University, the members of the Board of Trustees for Auburn University, the members of the Board of Trustees for Troy State University, the members of the Alabama Commission on Higher Education and the members of the Alabama Public School and College Authority.

3. The allegations of fact and law and the prayer for relief made by the Attorney General of the United States in the instant action are substantially the same as those set out in the amended complaint in *Knight v. Wallace,* as regards the institutions of higher education in Montgomery.

4. Petitioners for intervention have interests relating to the property or transaction which is the subject of this action and are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect their interests. In the instant action, the United States seeks an injunction requiring the defendants to disestablish on a statewide basis the racial segregation that exists in higher education and to develop, submit and implement detailed plans for eliminating all vestiges of the dual system in all the institutions of higher education in Alabama, including Alabama State University, Auburn University Montgomery and Troy State University Montgomery. Since Petitioners are seeking substantially the same relief regarding the Montgomery institutions in *Knight v. Wallace,* disposition of the instant action will clearly, as a practical matter, control the outcome of the controversy at issue in *Knight v. Wallace.*

5. In the alternative, Petitioners should be permitted to intervene in the instant action under Rule 24 (b) , because Petitioners' claims as set out in *Knight v. Wallace* have questions of law and fact in common with those presented in the instant action.

6. Petitioners' interests are not adequately represented by the existing parties in this action.

7. The requested intervention will not unduly delay or prejudice the adjudication of the rights of the original parties in this action.

WHEREFORE, Petitioners pray that the Court, upon due consideration, will enter an order as follows:

A. Granting their motion to intervene in this action as party plaintiffs; and,

B. Joining as defendants and ordering served with process, in their official capacities, the members of the Boards of Trustees for Alabama State University, Auburn University, and Troy State University, and the members of the Alabama Commission on Higher Education and the Alabama Public School and College Authority.

Respectfully submitted this 14th day of September, 1983.

DONALD V. WATKINS
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BLACKSHER, MENEFEE & STEIN, P.A.
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By: /s/ J. U. BLACKSHER
JAMES U. BLACKSHER
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and,

Thomas H. Keeling, Esq.
Harvey L. Handley, III, Esq.
Jay P. Heubert, Esq.
Department of Justice
General Litigation Section
Civil Litigation Section
Washington, D. C. 20530

by depositing same in the United States mail, postage prepaid.

/s/ J. U. BLACKSHER

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NUMBER:
	)	
THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; THE BOARD OF TRUSTEES FOR ALABAMA A&M UNIVERSITY, a public corporation; THE BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY, a public corporation; AUBURN UNIVERSITY, a public corporation; JACKSONVILLE STATE UNIVERSITY, a public corporation; LIVINGSTON UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE UNIVERSITY OF MONTEVALLO, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation; THE UNIVERSITY OF NORTH ALABAMA, a public corporation; THE UNIVERSITY OF SOUTH ALABAMA, a public corporation; THE ALABAMA COM-	)	CV 83 C 1676 S

MISSION ON HIGHER EDUCATION; and THE ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY,

Defendants.

MOTION TO INTERVENE

Pursuant to Rule 24(a) and 24(b), Federal Rules of Civil Procedure, the University Legal Defense Fund (hereinafter referred to as ULDF), and the National Alumni Normalite Association (hereinafter referred to as NANA), move the instant Court to allow them to intervene as party defendants for the following reasons: however, in the event that defendant Alabama A&M University's Motion to be Realigned as a Plaintiff is granted, then in said event, the said moving parties request to intervene as Plaintiffs.

1. ULDF is an incorporated non-profit organization dedicated to the progress and preservation of Alabama A&M University and other predominantly Black institutions in the State of Alabama. Presently, the primary focus of the organization is upon Alabama A&M University. ULDF is completely supported by contributions. Though ULDF works closely with the administrators and officials of the said A&M, no portions of ULDF's programs rely upon funds from this or any other institution. ULDF seeks, inter alia, to secure financial compensation for Alabama A&M as a result of past years of discrimination in funding, and to insure that Alabama A&M maintains its identity as a predominantly Black institution, while at the same time making its resources available to all qualified persons without regard to race, color or creed. Membership in the organization is open to any person or organization who supports and is willing to work to attain the objectives and purposes of the said organization.

2. NANA is a non-profit organization founded in 1940, and acquired a full-time office on the campus of Alabama A&M

in 1970. The president of the organization is Dr. Taylor Byrd. NANA represents over thirty thousand (30,000) Alabama A&M graduates. The said organization is open to all graduates, former students, and those currently enrolled as undergraduates. NANA has an executive board comprised of thirty-three (33) people, thirty (30) are elected by the National Body itself, and three (3) are appointed by NANA's president. The objectives of NANA are congruent to those espoused by ULDF as previously outlined in paragraph 1 above.

3. The Complaint states, inter alia, that the institutions of the Alabama system of public higher education are largely segregated by race, and are racially discriminatory in their practices and policies of admission, faculty hiring and assignment, and in their provisions of facilities, resources, curricular, extra-curricular programs and activities. The Complaint requests an order enjoining the defendants from maintaining and perpetrating racial dualism in the State supported system of higher education in Alabama, and that the defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education within the State.

4. The allegations and relief requested as stated in paragraph 3 above have a direct bearing on the vested interest of ULDF and NANA as pertain to their objectives and interest in Alabama A&M as outlined in paragraphs 1 and 2 above. Though several Defendants were named in the Complaint in question, including the board of trustees for Alabama A&M University, none of the said Defendants could adequately represent the moving parties, ULDF and NANA. The objectives and interest of the two moving parties would be greatly impaired if they are not permitted to intervene in the instant case. The Complaint requests, inter alia, that the Defendants develop, submit, and implement detailed plans to eliminate all vestiges of a dual system of higher education within the State. To secure their objectives and interest, ULDF and NANA need to be party Defendants to give their input in any and all programs which may be devised to comply with the requests

of the Complaint, for all such proposals would have a direct bearing on the two said moving parties. The intervention of ULDF and NANA would not unduly delay or prejudice the adjudication of the rights of the original parties.

THEREFORE, movants pray that the Court will grant them status as intervening defendants.

Respectfully submitted,

/s/ DEMETRIUS C. NEWTON

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(205) 252-9203
Attorney for Intervening
Defendants

Thomas M. Todd, Esquire
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Chicago, IL 60602
(000) 000-0000
Attorney for Intervening
Defendants

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Intervene has been served on all counsel of record by United States mail, postage prepaid, on this the 19th day of August, 1983.

/s/ DEMETRIUS C. NEWTON

Demetrius C. Newton

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NUMBER
THE STATE OF ALABAMA, et al.,	)	83-C-1676-S
Defendants.	)	

MEMORANDUM OPINION AND ORDER
GRANTING LIMITED INTERVENTION

Petitioners University Legal Defense Fund ("ULDF") and National Alumni Normalite Association ("NANA") seek intervention in this action so that they may ". . . give their input in any and all programs which may be devised to comply with the requests of the Complaint, for all such proposals would have a direct bearing on [them]."

ULDF is a non-profit corporation whose mission is, among other things,

> ". . . to secure financial compensation for Alabama A & M as a result of past years of discrimination funding, and to insure that Alabama A & M maintains its identity as a predominantly black institution, while at the same time making its resources available to all qualified persons without regard to race, color, or creed."

NANA is an organization of alumni of Alabama A & M University, ("A&M") with a mission similar to that of ULDF.

Petitioners are not entitled to intervene as of right, because they have neither established an unconditional statutory right of intervention, nor have they established that any of their le-

gally cognizable rights are inadequately represented by the existing parties.

However, the petitioners' claims include factual and legal questions common to those raised by the plaintiff and the re-aligned plaintiffs. To the extent that those questions relate to alleged statutory and constitutional violations, unrestricted intervention will unduly delay the adjudication of the rights of the original parties, since a trial date has already been set. More importantly, as to these alleged violations, petitioners' interests are co-extensive with those of A&M, a party to this action; and those interests are being adequately protected by A&M.

If the plaintiff and the re-aligned plaintiffs prevail in this action, it appears to the Court, in the exercise of its discretion, that ULDF and NANA should be heard on any proposed plans of desegregation. Accordingly, their intervention in the action should be limited to that of presenting to the Court their views, by testimony or otherwise, on any proposed plan of desegregation which involves A&M, should this case reach that post-trial stage.

It is therefore ORDERED that the University Legal Defense Fund and the National Alumni Normalite Association be granted limited intervention in this cause, for the purpose of providing the Court with their views on any plan of desegregation which may be presented to the Court in the event that the plaintiffs and the re-aligned plaintiffs prevail at trial.[1]

DONE this 28th day of November, 1984.

/s/ U. W. CLEMON

United States District Judge
U. W. Clemon

---

[1]Counsel for ULDF and NANA need not be served with papers hereinafter to be filed in this case, other than this order, unless and until the Court renders a decision in favor of plaintiff and re-aligned plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	CV-83-C-1676-S
THE STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Auburn University and its Board of Trustees (hereinafter referred to as "Auburn University" or "Auburn"), defendants herein, hereby appeal to the United States Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a), from the Order and Memorandum Opinion entered in this action on the ninth day of December, 1985.

Bases for Appeal of the Court's Memorandum of Opinion and Order

Auburn's appeal is brought pursuant to 28 U.S.C. § 1291, which provides that Courts of Appeals shall have jurisdiction of appeals from final judgments of United States District Court and, alternatively, pursuant to 28 U.S.C. § 1292(a)(1), which provides that Courts of Appeals shall have jurisdiction of appeals from interlocutory orders granting injunctive relief. These alternative bases for appeal will be developed herein.

Statement of Facts

This action was commenced by the United States on June 11, 1983 against the State of Alabama, its Governor, its State

Board of Education, ten state colleges and universities, the Alabama Commission on Higher Education and the Alabama Public School and College Authority. The action was brought pursuant to Title VI of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983.

The Complaint alleges that, based upon an investigation of higher education in Alabama, the United States Department of Education had made findings that the State of Alabama was in violation of Title VI by failing to eliminate the vestiges of a former racially dual system of higher education. The Complaint also alleges that upon failure of the State of Alabama to present a desegregation plan satisfactory to the Department of Education, such Department referred the matter to the Department of Justice for enforcement.

The Complaint states that prior to 1953, the State of Alabama established and maintained a racially dual system of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education. Among the defendant institutions, the Complaint alleges Alabama A&M University and Alabama State University to be traditionally black institutions and all others, including the defendant Auburn University, to be traditionally white institutions.

On July 25, 1983 a motion was filed by Alabama A&M University to be realigned as party plaintiff in order to assert Title VI, 42 U.S.C. § 1981 and 1983 and Fourteenth Amendment claims against Auburn University, the University of Alabama and the State of Alabama. A similar motion was filed by Alabama State University on August 3, 1983. The Court granted these motions and gave Alabama A&M and Alabama State leave to assert claims, as plaintiffs, against the defendants.

On September 6, 1983, Auburn University moved to disqualify the trial judge pursuant to 28 U.S.C. § 144 and 28

U.S.C. § 455. As grounds therefor, Auburn asserted, *inter alia*, that the trial judge was biased and prejudiced against it and in favor of the realigned plaintiffs Alabama A&M University and Alabama State University and that his relationship with Mr. Donald Stewart, counsel for Alabama A&M, who as a United States Senator had sponsored his nomination as a United States District Judge three years earlier, was such that a reasonable person might doubt his impartiality. This issue was particularly important to Auburn because Alabama A&M was asserting a right to administrative control, in the northern half of Alabama, of the Alabama Cooperative Extension Service and the Alabama Agricultural Experiment Station, both of which have been administered by Auburn University for seventy-five years. Auburn also alleged that the trial judge had extrajudicial access to facts relevant to the present action because he was one of the attorneys for plaintiffs in *Lee v. Macon County Board of Education*, the previous statewide public school and college desegregation suit in Alabama.

The trial court overruled the motion to disqualify. On October 12, 1983, Auburn University filed a petition for writ of mandamus with the Eleventh Circuit Court of Appeals setting forth that its motion for disqualification under both 28 U.S.C. § 144 and 28 U.S.C. § 455 should have been granted. The Court of Appeals held Auburn's § 144 affidavit to be legally sufficient but remanded the matter with directions that another judge assigned to hear the recusal proceedings. On December 19, 1983, Judge Hobart H. Grooms of the United States District Court for the Northern District of Alabama entered an opinion and order finding that a reasonable person would harbor a doubt as to the trial judge's impartiality and granting Auburn's motion for recusal. On January 19, 1984, Judge Grooms vacated his order and recused himself, stating that the recusal proceedings should be heard by a judge who was not a member of the United States District Court for the Northern District of Alabama. On February 13, 1984, the matter was heard again before the Honorable Judge David W.

Dyer who, on March 16, 1984, denied Auburn's motion for recusal of the trial judge.[1]

On September 15, 1983, a class of individuals described as "students, alumni, faculty and administrators of Alabama State University," represented by John F. Knight, Jr., moved the Court to intervene in the present action. The "Knight Intervenors" sought in their complaint an intervention to eliminate the "vestiges of prior *de jure* segregation" alleged to be present in the three Montgomery, Alabama public institutions of higher education, Auburn University at Montgomery, Alabama State University and Troy State University at Montgomery. The Knight class was certified and intervention was allowed by the District Court on January 3, 1985.

After one and one half years of intensive discovery, in which a number of disputes arose, including one area of controversy that resulted in conflicting decisions by the trial court and Judge Marvin Shoob of the United States District Court for the Northern District of Georgia, the case was tried during the entire month of July and the first week of August, 1985. The

[1]Subsequently, in June of 1984, the United States District Court for the Northern District of Georgia compelled the United States to produce documents requested by Auburn during depositions of United States Department of Education personnuel in Atlanta. These documents included a newspaper clipping attached hereto as Exhibit A, which relates the trial judge's actions while a member of the Alabama State Senate in leading a filibuster, on racial grounds, in opposition to the appointment of a white person as a member of the board of trustees of predominantly black Alabama State University. The existence of this document was unknown to this defendant at the time the recusal motions were being considered, and it is obviously relevant on that issue. But it is also relevant on the merits. Dr. Steven Wright, a United States' expert witness, gave opinion evidence the elimination of racial identifiability of student bodies. The article was made an exhibit to Dr. Wright's deposition, but the trial court refused to permit cross-examination of the witness on this issue and refused to allow the deposition and its exhibits to be introduced into evidence at trial. In the trial court's Memorandum Opinion, the racial identifiability of institutional governing boards, including Alabama State's was considered "probative" to the "question of whether the dual system has been disestablished." Opinion at 62, 75. The fact that the "Governor has generally appointed blacks to the board" was characterized as a vestige of segregation. Opinion at 75.

trial involved 9000 pages of transcript, and over 1,700 exhibits were introduced.

On December 9, 1985 the Memorandum of Opinion and Order, which concluded "that the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; that in other respects, the 'root and branches' of the dual system have not been eliminated," was entered. Memorandum of Opinion at 2. The court ordered the "Defendants State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority [to] submit to the Court not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of higher education in Alabama." The Court's Order specified that within fifteen days the "affected institutions" will submit their "comments or objections" to the plan in twenty-five pages or less. *See* Order at 2.

In its opinion, the trial court declared no longer viable a United States Supreme Court decision from this circuit, *Alabama State Teachers Association v. Alabama Public School and College Authority, et al.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd.* 393 U.S. 400 (1969), which has not been overruled and which establishes duties and principles of law in relation to desegregation in higher education that are irreconcilable with the District Court's Order.

The Court's Memorandum of Opinion, with a high degree of specificity, makes the following findings, *inter alia,*

1) that "[t]he continued recognition of a special 'constitutional status' for the University of Alabama and Auburn due to their inclusion in the 1901 constitution, when Alabama State and Alabama A&M were omitted from the said constitution for racial reasons, is a vestige of the dual school system." (Opinion at 91),
2) that the assignment of the Alabama Agricultural Experiment Station and the Alabama Cooperative Extension Service to Auburn University is unconstitutional, (Opinion at 56, 61-62),

3) that Auburn University's admissions requirements impermissibly exclude blacks from attendance at Auburn, (Opinion at 71-72),
4) that Auburn does not actively recruit blacks for faculty positions (Opinion at 71),
5) that "[t]here is substantial needless duplication of the education and business programs offered by AUM [Auburn University at Montgomery] and ASU [Alabama State University]," and that "[t]he presence of duplicated programs at AUM – a much newer and more attractive facility than ASU – has a negative impact on which enrollment at ASU," (Opinion at 75),
6) that the "undergraduate and graduate teacher education and certification programs offered at UAH [University of Alabama in Huntsville] unnecessarily duplicate similar and older programs offered at [Alabama] A&M" and thereby reduce its white enrollment, (Opinion at 66-67),
7) that computer science courses at UAH unnecessarily duplicate similar courses at A&M thereby reducing white enrollment at A&M, (Opinion at 67),
8) that the races of the chief executive officers of the Alabama public institutions of higher education is a vestige of the prior *de jure* segregated system of higher education, (Opinion at 89),
9) that "Alabama's choice of resource allocation for facilities for the period 1965 to 1983 significantly impaired the ability of Alabama State and [Alabama] A&M to attract white students," (Opinion at 89), and
10) that the state's financial resource allocation for things other than facilities has caused Alabama A&M's and Alabama State's student bodies to remain segregated, (Opinion at 90-91).

In the Order appealed from, the District Court ordered and directed that each of these "vestiges" be eliminated, directing that a plan to eliminate them be submitted by four of the defendants by February 14, 1986 and permitting Auburn and

others to comment within fourteen days in twenty-five pages or less.

The grounds for Auburn's appeal will be embraced in two general headings, *viz*: (1) errors in the Court's legal conclusions and evidentiary findings on the merits and (2) error in denying Auburn's recusal motion under the facts as set out in Auburn's 28 U.S.C. § 144 affidavit and as presented at the hearings on recusal.[2]

Auburn will establish in its brief to be filed later in this appeal that the District Court's Memorandum of Opinion and Order apply incorrect legal principles and make factual findings that are clearly erroneous. The evidence presented during the trial of this action established that race played no part in the Alabama constitutional provisions vesting management and control of Auburn University and the University of Alabama in their boards of trustees, that AUM has been a race neutral institution since its creation, that allocation of state financial resources has not disfavored ASU or A&M, that Auburn's status as administrator of Alabama's statewide agricultural Experiment Station and statewide Cooperative Extension Service[3] — has nothing to do with race, that the ACT as used by Auburn is a valid test and that Auburn actively recruits black faculty. Auburn will also establish that based upon the evidence available prior to the March, 1984 order on recusal, it was abundantly clear that the trial judge has an extrajudicial bias against Auburn as well as against others for whose actions the United States contends Auburn is to be held accountable.[4]

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[2]As held by the Eleventh Circuit in considering Auburn's petition for mandamus, "The affidavit sets forth sufficient factual allegations to require that the 'judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.' 28 U.S.C. § 144." The record will demonstrate that in denying Auburn's recusal motion, Judge Dyer did not find that the facts presented in the § 144 affidavit were untrue.

[3]The administrative structure of the Alabama Cooperative Extension Service was desegregated and reorganized pursuant to court orders in *Strain v. Philpott,* CV840-E, United States District Court for the Middle District of Alabama, which currently exercises continuing jurisdiction over these matters.

[4]The United States has never cited or relied on "institutional" vio-

The Court's Order and Memorandum of Opinion Constitutes a "Final Judgment" Appealable Pursuant to 28 U.S.C. § 1291

28 U.S.C. § 1291 provides that:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ., except where a direct review may be had in the Supreme Court.

What constitutes a "final decision" has been the subject of extensive discussion in the appellate courts of the United States, especially where the district court appears to have decided less than all of the issues in the case or where, as here, the court orders one or more of the parties to devise a plan to implement its decision.

The United States Supreme Court addressed just such an issue in *Brown Shoe Company, Inc. v. United States,* 370 U.S. 294 (1962). *Brown Shoe* was an appeal brought pursuant to the Expediting Act, 15 U.S.C. § 29,[5] from a decision of a district court in an antitrust action.

The district court's order in *Brown Shoe* held that the merger of Brown Shoe Company with Kinney Shoe Company substantially lessened competition in the family shoe market and constituted a violation of the Clayton Act, 15 U.S.C. § 18. *See United States v. Brown Shoe Company,* 179 F.Supp. 721 (E.D. Mo. 1959). The district court ordered the defendant Brown Shoe Company to "relinquish and dispose of the acquired stock of defendant Kinney" and enjoined "Brown and

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lations of Title VI; indeed, the Department of Education investigation found none. Rather, the United States has focused throughout on a "statewide" approach that disregards institutional innocence, contrary to *Grove City College v. Bell,* _____ U.S. _____, 104 S. Ct. 1211 (1983), and for that reason bias of the trial judge for or against any institution agency or official of higher education in Alabama has the potential to impact upon Auburn University under the United States' approach to this case.

[5]The Expediting Act provides that the United States Supreme Court has jurisdiction of appeals from final orders of United States district courts in antitrust cases in which the United States is a party.

Kinney, their agents, servants, officers and employees from acquiring any interest in the stock or assets of the other defendant." *See* 179 F.Supp. at 741.

The district court, recognizing the complexity of the situation and the difficulty of implementation of the divestiture, held that it "should hear any evidence which the defendants might wish to offer touching the effects of the disposition of the stock and the suitable manner in handling same. The government should be given an opportunity to express opposition or suggestion therein." 179 F.Supp. at 742. The court held that no "final" judgment would be entered until after such hearing and the approval by the court of an acceptable plan for divestiture. 179 F.Supp. at 742.

Brown Shoe Company appealed the order of the district court immediately, without waiting for a decision from the district court adopting a plan for the divestiture. The United States Supreme Court raised the issue of the finality of the district court's decision on its own, stating that, "[i]t was suggested from the bench during the oral argument that, since the judgment of the District Court does not include a specific plan for the dissolution of the Brown-Kinney merger, but reserves such a ruling pending the filing of suggested plans for implementing divestiture, the judgment below is not 'final' as contemplated by the Expediting Act." 370 U.S. at 305. The Court, after noting that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action,'" 370 U.S. at 306; held that the decree of the district court "had sufficient indicia of finality for us to hold that the judgment is properly appealable at this time." 370 U.S. at 308.

The Supreme Court held that the requirement of the submission of a plan designed to implement the order for divestiture did not deprive it of jurisdiction since, in the event the District Court's order was affirmed, "the sole remaining task for the District Court will be its acceptance of a plan for full divestiture, and the supervision of the plan so accepted. Further rulings of the District Court in administering its decree,

. . . are sufficiently independent of, and subordinate to, the issues presented by this appeal to make the case in its present posture a proper one for review now." 370 U.S. at 308.

The Court's decision that the order was final was buttressed by the fact that the "[a]ppellant here does not attack the full divestiture ordered by the District Court as such; it is appellant's contention that under the facts of the case, as alleged and proved by the Government, *no* order of divestiture could have been proper. The propriety of divestiture was considered below and is disputed here on an 'all or nothing basis' " 370 U.S. at 308-309.

An additional reason cited by the Court for deciding the issue in favor of finality was the magnitude of the divestiture ordered by the district court. The Court held that "[s]uch an order requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum, but, rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assuring expeditious enforcement of the antitrust laws." 370 U.S. at 309.

Thus, the Court ruled that where the order of a district court makes clear the result sought, the fact that the method for the accomplishment of the result is yet to be established does not render the court's decision any less "final." Rather, when the court has decided the issue of liability and has ordered the relief sought in the complaint, the fact that further rulings of the district court may be necessary to implement or administer its decree does not deprive the appellate court of jurisdiction. *See* 370 U.S. at 308.

In *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the United States Supreme Court defined and elaborated on the principles applied in *Brown Shoe* in holding that the requirement of finality is to be given a "practical rather than a technical construction." The Court held that questions in the so-called "twilight zone of finality" should be decided

by balancing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other," as well as by considering the importance of the question presented to "the further conduct of the case." 379 U.S. at 152-153. The court in *Gillespie* conclusively established that in order to be "final," a decision need not be "the last order possible to be made in a case." 379 U.S. at 152.[6]

In *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974) *cert. denied*, 419 U.S. 1108 (1974), the Sixth Circuit Court of Appeals applied the principles set forth in *Gillespie* to an order of a district court that individual plaintiffs had made out a case under the Fair Housing Act that municipal defendants had violated the plaintiffs' constitutional rights by refusing to execute cooperation agreements with a housing authority to construct low-cost housing. The district court "treated the case before him like a school desegregation case and ordered CMHA [the housing authority] 'to prepare a plan setting forth the number of scattered site units it intends to place in each of the defendant suburbs.'" 500 F.2d at 1090. The court held that the municipal defendants had the burden of showing "a compelling necessity" for not complying with the plan submitted. 500 F.2d at 1090-91, n.3.

The municipal defendants appealed prior to the submission of the court-ordered plan, and the Court of Appeals addressed the issue of finality as follows:

> *Gillespie* indicated that an appellate court should give consideration to four factors in determining whether an order of a lower court is 'final' within the meaning of 28 U.S.C. § 1291:

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[6]*See Thoms v. Heffernan*, 473 F.2d 478 (2d Cir. 1973), *vacated on other grounds*, 418 U.S. 908 (1974), in which a decision of a United States District Court declared a flag misuse statute unconstitutional but neither granted nor denied injunctive relief. The Court of Appeals held that "[t]he fact that further proceedings leading to an injunction are possible below does not render the judgment of the district court in this case any less final." 473 F.2d at 481.

1. — Whether an order is final depends on whether it has been given a 'practical rather than technical construction,' . . . .
2. — Whether an order is final depends on whether the issue appealed is fundamental to the further conduct of the litigation . . . .
3. — Whether an order is final depends on whether the parties will be put to additional expenses if the appealed issue is not resolved by the appellate court.
4. — In cases where the issue of finality is close or marginal, the court of appeals should find in favor of finality.

500 F.2d at 1090-91, n.3.

The *Mahaley* court held that the four elements of finality, as they applied to the case before it, were satisfied in that: 1) the district court had, in effect, rejected any reason the municipal defendant might advance for not executing the cooperation agreements in question, 2) the question of whether the municipalities had violated 42 U.S.C. § 1983 by their refusal to sign cooperation agreements was "fundamental to the further conduct of this case," 3) the inconvenience and cost of a second trial would be great, especially since "the trial record contains all the evidence necessary for this Court to make a full and complete disposition of all of the issues in the case," and 4) the issue of finality was not even close. *See* 500 F.2d at 1091, n.3.

In *Morales v. Turman*, 535 F.2d 864 (5th Cir. 1976), *rev'd* 430 U.S. 322 (1977) (expressly affirming on the issue of the finality of the district court's order), the Fifth Circuit Court of Appeals reviewed the decision of the United States District Court for the Eastern District of Texas that the constitutional rights of minors incarcerated in Texas juvenile correctional facilities had been violated and ordering all parties to meet and agree upon a plan to eliminate the unconstitutional conditions found by the district court in accordance with certain "minimum standards" enumerated by the court in *Morales v. Turman*, 333 F. Supp. 53 (E.D. Tex. 1974). The Fifth Circuit

held that the district court's order was final under 28 U.S.C. § 1291, stating:

> Appellees concede the finality and appealability of the lower court's determination that the constitutional rights of minors incarcerated by the TYC have been violated. They maintain, however, that the detailed 'minimum standards' necessary for protection of those rights — particularly the right to treatment — are not final because the judge withheld issuance of permanent injunctive relief pending submission of a comprehensive plan to be drawn up by the parties. The difficulty with this contention is that while some flexibility was left to the parties in determining precisely how compliance with the minimum standards would be structured, the District Court made it perfectly clear that any plan submitted must be consistent with the minimum requirements laid out in its opinion. *See* 383 F. Supp. at 126. In circumstances such as these, the requirement of finality must be given a practical construction. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53, 85 S. Ct. 308, 311, 13 L.Ed. 2nd 199 (1964). The fact that the lower court has instructed the parties to arrange the details of implementing its decision does not imply that the underlying determination of the minimum standards supposedly required by the right to treatment are not appealable.[7]

535 F.2d at 867, n.6.

The Fifth Circuit rejected the contention by the appellee that the minimum standards established by the district court were "mere guidelines subject to further negotiation by the parties." Rather, the court held that the district court's opinion constituted:

> "a final ajudication determining the minimal content that must be given to the 'right to treatment' as it applies to virtually every aspect of TYC operations."

535 F.2d at 867, n.6.[8]

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[7]The United States Supreme Court, though reversing on the merits, expressly affirmed the Fifth Circuit's holding as to finality.

[8]The *Morales* opinion is consistent with the Fifth Circuit's decision in *Board of Public Instruction of Duval County v. Braxton*, 326 F.2d 616 (Fifth Cir. 1964). In *Braxton*, the Fifth Circuit held that the order of a

As in *Brown Shoe,* the district court order has made specific findings of illegal conditions and practices, and has ordered the state to submit a plan to eliminate those conditions and practices. "The sole remaining task for the District Court will be its acceptance of a plan [to eliminate the vestiges][9] and the supervision of the plan so accepted." *See Brown Shoe Co. v. United States,* 370 U.S. 294, 308 (1962). *Brown Shoe* illustrates that the court's decision is not merely a decision on liability, leaving remedy to be decided at a later time.

It is clear that, as in *Morales,* the court in the instant case, while leaving some "flexibility" to the State in determining precisely how the elimination of the vestiges would be accomplished, "made it perfectly clear that any plan submitted must be consistent with the minimum requirements laid out in its opinion." *See Morales,* 535 F.2d at 867, n.6. "The fact that the lower court has instructed the parties to arrange the details of implementing its decision does not imply that the underlying determination of the minimum standards supposedly required by the right to treatment are not appealable." *See Morales,* 535 F.2d at 867, n.6. As the Fifth Circuit stated in *Morales,* the vestiges found by the Court "constitute a final adjudication determining" the conditions in Alabama's public institutions of higher education which must be either eliminated or changed in strict accordance with the court's opinion in order for any plan submitted by the State to comply with the order.

The court's exclusion of Auburn and the other state institutions of higher education from the planning process is another

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district court in a school desegregation case that a plan be submitted that would eliminate certain specified unconstitutional conditions in the school system was appealable because it foreclosed any discretion on the part of the school board ordered to submit the desegregation plan by specifically enumerating the conditions to be eliminated. *See* 326 F.2d at 619.

[9]It would not be inaccurate to say that the district court has ordered the defendants to "divest" themselves of the "vestiges" it found. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 305 (1962). As in *Brown Shoe,* the United States received *everything* it asked for, an order requiring the submission of a plan designed to eliminate the alleged vestiges of the prior racially dual school system.

ground for deciding the question of practical finality in favor of Auburn. From its standpoint, Auburn has been found guilty and has no say as to remedy in this case other than to object to and comment upon the plan submitted by the State defendants in twenty-five pages or less. The exclusion of Auburn from the planning process effectively ends the trial as far as Auburn is concerned and makes the court's decision final.

The other three elements of finality enumerated by the *Mahaley* court are all in favor of finality in this case. First, there is no question that the correctness of the court's decisions with regard to the vestiges cited by the court in its Memorandum of Opinion, including the constitutional status of Auburn, the administration of the Alabama Agricultural Experiment Station and Alabama Cooperative Extension Service,[10] Auburn's admissions requirements and the duplication of programs is fundamental to the further conduct of this case. Reversal of the court on these issues would have a profound impact on its finding of liability in general and completely redefine any remedy ordered.

Next, the inconvenience and cost of a second trial in this case, should the court's decision be reversed, as well as the expense of discovery and a hearing in the remedial phase, justify appeal at this time, especially since, as in *Mahaley*, "the trial record contains all of the evidence necessary for [the Appellate Court] to make a full and complete disposition of all of the issues in this case." 500 F.2d at 1091. This factor is particularly important in this case since, as in *Brown Shoe*, administration of the remedy will likely be a lengthy and complicated task.

A reversal by the Court of Appeals on any of the major issues before it on this appeal, such as whether the District Court had

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[10]Title VI enforcement authority for these programs rests with the U.S. Department of Agriculture under 7 CFR Part 15, and the appendix thereto. USDA has found them to be *in compliance* with Title VI, and USDA had no role in bringing this action. These programs were not, and could not properly have been, included in the Title VI investigation by the Department of Education, which caused this action to be filed.

jurisdiction of claims relating to programs administered by the United States Department of Agriculture,[11] whether program transfers are necessary or appropriate between Auburn University in Montgomery[12] and Alabama State University, whether Alabama A&M and Alabama State have been discriminated against in terms of financing and capital improvements or whether Auburn's use of high school grades in combination with the American College Test as an admissions criterion is valid, would, if decided in Auburn's favor, narrow the scope of relief in the case and thereby reduce the time and expense associated with the implementation and administration of any plan approved by the court. Similarly, and perhaps even more importantly, reversal on the issue of recusal at this point in the proceedings would be more economical than reversal after the approval and implementation of a plan.

Finally, any court-approved plan that is designed to alter the racial composition of students and faculty at the defendant universities would be more effective if the legal conclusions and factual findings underlying the implementation of the plan were reviewed by this Court prior to the plan's implementation. The success or failure of any plan approved by the court will depend not only upon the efforts of the parties but upon the public's perception of its permanence. A plan perceived as temporary pending review by the Court of Appeals will not likely affect attendance patterns of students nor application flow for faculty positions. On the other hand, if the order requiring submission of a plan is not reviewed now, the administration of the plan will disrupt, perhaps needlessly, the education of students and affect employment of faculty, including tenured faculty, at institutions whose programs are altered consistent with the court's opinion. "The unsettling influence of

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[11]See note 10 *supra*.

[12]AUM was created after legal segregation ended in Alabama, and it is undisputed that it has never been segregated or discriminated against anyone on the basis of race. Its creation was approved in *Alabama State Teachers Association v. Alabama Public School and College Authority, et al.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd.* 393 U.S. 400 (1969).

uncertainty as to the affirmance of the initial, underlying decision compelling" the implementation of the plan "would only make still more difficult the task of assuring expeditious enforcement" of the civil rights laws. *Cf. Brown Shoe Company v. United States,* 370 U.S. 294, 309 (1962).

Finally, since the Court of Appeals should find in favor of finality "where the issue of finality is close or marginal," the similarity of the case at bar to the *Brown Shoe, Mahaley,* and *Morales* cases should compel a determination that the court's Memorandum of Opinion and Order are final and appealable.

The Court's Order is a Mandatory Injunction Appealable Pursuant to 28 U.S.C. § 1292(a)(1)

An order requiring the submission of a plan to implement a decision of a United States district court may be appealable as a final decision, under 28 U.S.C. § 1291, or as an interlocutory mandatory injunction appealable under 28 U.S.C. § 1292 (a) (1). *See Morales v. Turman,* 535 F.2d 864, 867, n.6 (5th Cir. 1976), *rev'd.* 430 U.S. 322 (1977) (expressly affirming on the issue of finality). In the present case, even if the order of the district court is not a "final decision", it is a mandatory injunction appealable pursuant to 28 U.S.C. § 1292 (a) (1).

In *Board of Public Instruction v. Braxton,* 326 F.2d 616 (5th Cir. 1964), the Fifth Circuit Court of Appeals held that the order of the United States District Court for the Middle District of Florida requiring a county school board to submit a plan designed to eliminate segregation in the county's schools was a mandatory injunction appealable pursuant to 28 U.S.C. § 1292 (a) (1). The court distinguished the case before it from *Taylor v. Board of Education,* 288 F.2d 600 (2nd Cir. 1961), which held that a similar order was not appealable, on the grounds that the Florida court's order denominated certain practices and conditions which should be addressed by the plan. To the extent the Second Circuit held otherwise in *Taylor,* the Fifth Circuit expressly differed with that court's judgment. *See Braxton,* at 619. In the instant case, as in *Braxton,* the district

court has ordered the State to submit a plan eliminating vestiges specifically enumerated by the court in its order. Thus, the court in this case, as in *Braxton,* "positively and affirmative directed that a plan be submitted that *would provide for carrying out*" the elimination of the vestiges noted (emphasis supplied by court). *See* 326 F.2d at 619.

The fact that only the Governor, the Alabama Commission on Higher Education and the Alabama Public School and College Authority were ordered to prepare and submit the plan does not render the order unappealable as to Auburn. A litigant who was a party below and who is aggrieved by the judgment or order may appeal the judgment or order. *See e.g. Burleson v. Coastal Recreation, Inc.,* 572 F.2d 509 (5th Cir. 1978). In the present case, Auburn has clearly been "aggrieved" by the court's Memorandum of Opinion and Order. It has been held guilty of racial discrimination and of being a part of a segregated system of higher education of the State. The court has ordered that its state constitutional status violates the United States Constitution and that its status as the premier land-grant institution in the State of Alabama is due to impermissible racial motives. Its use of the ACT test as an admissions criterion has been held invalid. Critical programs at AUM, which without dispute has never discriminated based on race, have been characterized as vestiges of an era in which it did not exist.[13] The Court has ordered the State to submit a plan which would eliminate all of these conditions that Auburn has defended as race neutral and sought to preserve. Thus, Auburn is clearly "aggrieved" by the Court's opinion, even if it has not been ordered, or allowed, to participate in the preparation and submission of the plan.

Even non-parties have been allowed to appeal judgments of United States District Courts if the court's decree significantly affects their interests; *see e.g., United States v. Chagra,* 701 F.2d 354 (5th Cir. 1983); *Securities and Exchange Commission v. Lincoln Thrift Association,* 577 F.2d 600 (9th Cir. 1978); *West*

[13]See note 12 *supra.*

v. Radio-Keith Orpheum Corp., 70 F.2d 621 (2d Cir. 1934); or requires action on their part to effectuate the remedy. *See Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980). In both *Securities and Exchange Commission v. Lincoln Thrift Association*, and *West v. Radio-Keith Orpheum Corp.*, non-party creditors who asserted rights in receivership proceedings were allowed to appeal orders affecting their legitimate interests. In *Chagra* as well as in many other cass from the Fifth Circuit, non-parties were allowed to appeal orders of district courts enjoining the publication of court files or the closure of hearings from the public. *See also Belo Broadcasting Corp. v. Gurney*, 654 F.2d 423, 425-426 (5th Cir. 1981); *United States v. Gurney*, 558 F.2d 1202, 1206-07 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

In *Brown v. Board of Bar Examiners of State of Nevada*, 623 F.2d 605 (9th Cir. 1980), the district court dismissed the Board of Bar Examiners of the State of Nevada from an action to enjoin the state from denying a graduate of an unaccredited law school admission to the state bar. Nevertheless, the court issued a preliminary injunction enjoining the "defendants" from preventing Brown from sitting for the bar examination. 623 F.2d at 607. Because the Supreme Court of Nevada had delegated to the Board of Bar Examiners the power to examine applicants for admission to the Bar, the Ninth Circuit Court of Appeals held that the Board was a proper party to appeal the district court's ruling, regardless of the lower court's holding that the Board was due to be dismissed from the case. 623 F.2d at 607. Auburn will be required to comply with whatever plan is approved by the Court regardless of its participation in plan formulation. Therefore, Auburn would be a proper party to appeal even were it not a party to the litigation.

Conclusion

Auburn has asserted two bases for appeal of the court's Memorandum of Opinion and Order. First, the Memorandum of Opinion and Order constitute a "final decision" appealable

pursuant to 28 U.S.C. § 1291 because its practical effect is to decide all of the issues, including remedial issues, in the present action. Alternatively, if interlocutory, the order is a mandatory injunction appealable pursuant to 28 U.S.C. § 1292 (a) (1) because it specifies the elements to be addressed by the plan submitted by the state defendants. Based upon the foregoing legal authorities, the memorandum of opinion and order are appealable by Auburn University without further action by the United States District Court for the North District of Alabama. In this appeal, the grounds will be error in legal principles applied and clear error in findings of fact, both on the merits and regarding recusal.

SAMFORD & SAMFORD and
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By: /s/ EDWARD S. ALLEN

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon the following attorneys by first-

class United States mail, postage prepaid, on this 5th day of February, 1986:

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Mr. T. Michael Putnam
Mr. Richard F. Calhoun
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/s/ EDWARD S. ALLEN

Of Counsel

EXHIBIT A

Solon Seeks Black Majority

Clemon Opposing ASU Board Nomination

By Lenore Reese

The chairman of Alabama State University's board of trustees may never be confirmed by the State Senate because of what one black senator has termed "racially discriminatory" actions by Gov. George Wallace.

Tom Radney, a white Alexander City attorney and former state senator, has been serving as board chairman since March 1975, although he has never been approved by the Senate.

And he won't be, according to Senator U. W. Clemon of Birmingham, who said today he'll oppose Radney's confirmation because he wants a black majority on the board.

Currently the board for the predominantly black school has a 5-4 white majority.

Clemon termed Wallace's appointment of five whites and four blacks "evidence of his undying dedication to the belief that black people are incapable of governing themselves."

Radney was the only ASU trustee not confirmed by the Senate during the last regular legislative session. His name was resubmitted by the governor's office during the current special session but has remained in the Rules Committee of which Clemon is acting chairman.

Clemon said he had "ample support" within the committee to keep the appointment from being brought before the full Senate.

Contacted in Alexander City, Radney said he planned to continue serving as board chairman under his "interim appointment" by the governor despite Clemon's opposition.

Radney said he did not think Clemon's stand was a personal matter because, "I don't even know him."

"I would call his attention to my voting record in the Senate on behalf of minorities," Radney said, adding that he was

"color-blind" and didn't believe in "quotas" on boards of trustees or elsewhere.

Radney was re-elected board chairman for another year last month.

Clemon said a similar situation involved confirmation of two trustees at the state's other predominantly black university, Alabama A&M in Huntsville.

He said Wallace's appointment of majority white boards of trustees at the two black schools was another example of his "racially discriminatory" behavior.

Clemon said he had no specific person in mind to replace Radney, only that he or she be a graduate of the university.

Under the bill creating the ASU board, the nine were to be appointed from each of the seven congressional districts and two from the state at large.

Before the board was created, the school was under the control of the State Board of Education.

Should Radney continue to serve without Senate confirmation, Clemon said he plans to take another look at the statute setting up the board to see if such a move would be legal.

Alabama Journal 6/6/77

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7090

AUBURN UNIVERSITY,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
JOHN F. KNIGHT, JR., et al.,
individually and on behalf
of others similarly-situated,
BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY
and ALABAMA A&M UNIVERSITY,
Plaintiffs-Appellees.

ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION FOR A STAY OF THE MEMORANDUM OF OPINION AND ORDER OF THE DISTRICT COURT PENDING APPEAL

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

Honorable George C. Wallace, Governor
Honorable U. W. Clemon, U. S. District Judge
Wayne Teague, Superintendent of Education
Alabama Public School and College Authority;
members in their official capacities
Alabama Commission on Higher Education;
members in their official capacities
The Board of Trustees of the University of Alabama;
members in their official capacities
The Board of Trustees of Alabama A&M University
The Board of Trustees of Alabama State University
The Board of Trustees of the University of
North Alabama
The University of South Alabama
The University of Montevallo
Jacksonville State University
Livingston University
The Board of Trustees of Troy State University;
members in their official capacities
The Board of Trustees of Auburn University;
members in their official capacities
John F. Knight, Jr., class action intervenor
Catherine Coleman, class action intervenor
Charles R. Anderson, class action intervenor
Alma S. Freeman, class action intervenor
John T. Gibson, class action intervenor
Susan Buskey, class action intervenor
Carl Petty, class action intervenor
Tamara L. Knight, class action intervenor
Dennis Charles Barnett, class action intervenor

That class of persons certified by the District Court on January 3, 1985
Sid McDonald, State Finance Director

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By /s/ EDWARD S. ALLEN

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MOTION FOR A STAY OF THE MEMORANDUM OF OPINION AND ORDER OF THE DISTRICT COURT PENDING APPEAL

Auburn University and its Board of Trustees (hereinafter Auburn), appellants herein, hereby make application for a stay of execution of the Memorandum of Opinion and Order entered by the District Court for the Northern District of Alabama in the case of *United States of America, et al. v. State of Alabama, et al.*, Civil Action No. 83-C-1676-S, on December 9, 1985. This matter is before this court on appeal, both from the court's order of August 20, 1985 granting Alabama State University's and the Knight Intervenors' request for a preliminary injunction, Eleventh Circuit Case No. 85-7582, and from the trial court's decision on the merits entered on December 19, 1985, (*See* Order and Opinion, attached hereto in Appendix One and Auburn's Notice of Appeal, attached hereto in Appendix Two).

This application for stay is directed to the court's order requiring submission, on February 14, 1986, of a plan to eliminate the vestiges of the "dual system of higher education in Alabama," and requiring the "affected institutions" to submit their comments or objections to the plan within 15 days.

The filing of Auburn's Notice of Appeal under 28 U.S.C. § 1291 has divested the district court of jurisdiction over further proceedings with respect to any plan submitted. In the event this court accepts jurisdiction of Auburn's appeal under 28 U.S.C. § 1292(a), however, Auburn, in the alternative, moves the court to stay all further proceedings with respect to any plan submitted, pending appeal.[1]

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[1]*United States v. Hitchmon*, 602 F.2d 689 (5th Cir. 1979) (*en banc*), holds that if a district court wrongly treats a notice of appeal as "manifestly ineffective" and proceeds to exercise jurisdiction over a matter currently under the jurisdiction of the court of appeals, then "the appellant may seek the aid of the court of appeals by applying for a writ of prohibition under 28 U.S.C. § 1651." The avoidance of proceedings in this court on a petition for writ of prohibition, in the event the district court wrongly characterizes Auburn's Notice of Appeal as "manifestly ineffective" is an additional reason to stay further proceedings in

As grounds for this motion, defendant shows unto the court that personal and property interests of Auburn, its students and faculty, the Alabama Agricultural Experiment Station (hereafter AAES) and the Alabama Cooperative Extension Service (hereafter ACES),[2] as well as Auburn's ability to attract qualified students, faculty and staff of all races will be irreparably damaged if the District Court's Opinion and Order are not stayed. The merits of this case involve many serious legal questions upon which Auburn has a substantial likelihood of success, including whether *Alabama State Teachers Association v. Alabama Public School and College Authority*,[3] which the trial court expressly declined to follow, is binding precedent. A more thorough review of Auburn's grounds for a stay follows.

I. STATEMENT OF THE CASE.

This action was commenced by the United States on June 11, 1983 against State of Alabama, its Governor, its State Board

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the court below, regardless of whether jurisdiction is accepted under 28 U.S.C. § 1291 or 28 U.S.C. § 1292.

[2]The ACES has 941 employees who, from offices in all 67 counties in Alabama disseminate information to farmers, homemakers and agribusiness, including the results of agricultural research conducted by the 773 employees, including 188 scientists, of the AAES, at the main station at Auburn and 21 substations throughout the state. The combined annual budget of these two organizations is approximately $45,000,000.

[3]*See Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F.Supp. 784 (M.D. Ala. 1968), aff'd.*, 393 U.S. 400 (1969), which holds that a policy of race-neutral admissions and hiring, administered in good faith, satisfies a college's duty to desegregate. The evidence is undisputed that Auburn has not practiced racial discrimination in student admissions or faculty hiring in the last twenty years, and that AUM has *never* discriminated on the basis of race. (*See* United States Responses to Auburn's Request for Admissions, attached hereto in Appendix Four, Nos. 16, 24).

Segregation in the Alabama Cooperative Extension Service has been eliminated by order of the United States District Court for the Middle District of Alabama in the case of *Strain v. Philpott*, CV-840-E, which continues to exercise jurisdiction over the matter. *See* p. 26, *infra*. As of May 1985, 30% of the ACES's employees were black, including one-half of the Department Heads, 25% of the County Professional Staff, 34%

of Education, ten state colleges and universities, the Alabama Commission on Higher Education and the Alabama Public School and College Authority. The action was brought pursuant to Title VI of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983. (*See* Complaint, attached hereto in Appendix Three).

The Complaint alleges that, based upon an investigation of higher education in Alabama, the United States Department of Education had made findings that the State of Alabama was in violation of Title VI by failing to eliminate the vestiges of a formerly racially dual system of higher education. (*See* Complaint, attached hereto in Appendix Three).

The Complaint further alleges that prior to 1953, the State of Alabama established and maintained a racially dual system of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education. Among the defendant institutions, the Complaint contends Alabama A&M University (hereinafter A&M) and Alabama State University (hereinafter ASU) to be traditionally black institutions[4] and all others, including the Defendant Auburn University, to be traditionally white institutions.

The Complaint alleges that the enrollment, faculty, staff and governing boards at each of the institutions of higher education are still identifiable by race. Further, the Complaint alleges

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of the State Support Staff and 25% of the County Support Staff. For the fiscal year 1983, approximately 25% of total staff contacts were with black clientele. Alabama's population is 26% black.

[4]On July 25, 1983, a motion was filed by Alabama A&M University to be realigned as party plaintiff in order to assert Title VI, 42 U.S.C. §§ 1981, 1983 and fourteenth amendment claims against Auburn, the University of Alabama and the State of Alabama. A similar motion was filed by ASU on August 3, 1983. The trial court granted these motions and gave A&M and ASU leave to assert claims, as plaintiffs, despite the well-established rule that state agencies are not endowed with such rights. *See* pp. 28-30, *infra*. (A&M and ASU Motions to Realign attached hereto in Appendix Three).

that in Montgomery, Alabama and Huntsville, Alabama the existence of Auburn University of Montgomery (hereinafter AUM) and the University of Alabama in Huntsville, in close proximity to ASU and A&M, respectively, impedes the ability of those traditionally black institutions to desegregate. This allegation is based upon an assertion that the academic programs at AUM and UAH unnecessarily duplicate similar programs at ASU and A&M, thereby providing prospective students with a choice of institutions based on race.[5] Finally, the Complaint alleges that the state has discriminated in favor of Auburn and against A&M by selecting Auburn, and not A&M, to be the recipient of the bulk of the state's share of federal financial assistance for agricultural research and instruction.

On September 6, 1983, Auburn moved to disqualify the trial judge pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455 on the grounds that the trial judge was biased and prejudiced against it and in favor of the realigned plaintiffs A&M and ASU, that his relationship with Donald A. Stewart, counsel for A&M, *who as a United States Senator sponsored the trial judge's appointment to the federal bench,* was such that a reasonable person might doubt his impartiality and that the trial judge had extrajudicial access to facts relevant to the trial of the present action because he was an attorney for the plaintiffs in *Lee v. Macon County Board of Education,* the previous state-wide public school and college desegregation suit in Alabama.

The trial court overruled the motion to disqualify. On October 12, 1983, Auburn filed a Petition for a Writ of Mandamus with the Eleventh Circuit Court of Appeals setting forth that its Motion for Disqualification under both 28 U.S.C. § 144 and 28 U.S.C. § 455 should have been granted. (*See* Petition for Writ of Mandamus, attached hereto in Appendix Five). This court held Auburn's § 144 affidavit to be legally sufficient but remanded the matter with directions that another judge be assigned to hear the recusal proceedings. (*See In Re: Au-*

[5]ASU, in its claims, seeks the merger of AUM into ASU in order to preserve ASU as the dominant institution in Montgomery. (*See* Appendix Three).

burn University Opinion of November 10, 1983, Case No. 83-7557, in the United States Court of Appeals for the Eleventh Circuit, attached hereto in Appendix Five).

On December 19, 1983, Judge Hobart H. Grooms of the United States District Court for the Northern District of Alabama entered an Opinion and Order finding that a reasonable person would harbor a doubt as to the trial judge's impartiality and granting Auburn's Motion for Recusal. (*See* Opinion on Motions for Recusal, December 19, 1983, attached hereto in Appendix Five). On January 19, 1984, Judge Grooms vacated his Order and recused himself, stating that the recusal proceeding should be heard by a judge who was not a member of the United States District Court for the Northern District of Alabama. On February 13, 1984, the matter was heard again before the Honorable Judge David W. Dyer who, on March 16, 1984, denied Auburn's Motion for Recusal of the Trial Judge. (*See* Opinion on Motions for Recusal, March 16, 1984, attached hereto in Appendix Five).

On January 3, 1985 the court certified and granted intervention to a class of individuals described as "students, alumni, faculty and administrators of Alabama State University," represented by John F. Knight, Jr., and others. The "Knight Intervenors" sought in their Complaint in Intervention to eliminate the "vestiges of prior *de jure* segregation" alleged to be present in the three Montgomery, Alabama public institutions of higher education, Auburn University at Montgomery (hereinafter AUM), ASU and Troy State University at Montgomery by compelling the merger of all three institutions under the ASU Board of Trustees. The Knight Intervenors' allegations tracked those of the United States regarding the unnecessary duplication of academic programs and asserted that this duplication could only be eliminated through the merger they proposed.

After one and one-half years of intensive discovery, the case was tried during the entire month of July and the first week of August, 1985. The trial record consists of some 9,000 pages of transcript, and over 1700 exhibits were introduced.

On December 9, 1985, the Court entered its Memorandum of Opinion and Order, which concluded "that the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; that in other respects, the 'root and branches' of the dual system have not been eliminated." (Opinion at 2). The court ordered the "Defendant State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority [to] submit to the court not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of higher education in Alabama." The court's Order specified that within fifteen days the "affected institutions" will submit their "comments or objections" to the plan in twenty-five pages or less (Order at 2).

In its Opinion, the trial court declared no longer viable the United States Supreme Court decision in *Alabama State Teachers Association v. Alabama Public School and College Authority, et al.*, 289 F.Supp. 734 (M.D. Ala. 1968), *aff'd.* 393 U.S. 400 (1969), which has not been overruled and which establishes duties and principles of law in relation to desegregation in higher education that are irreconcilable with the district court's Order.[6]

II. REQUEST FOR STAY IN THE DISTRICT COURT.

Auburn petitioned the District Court for the Northern District of Alabama for a stay of its Order on February 7, 1986, two days after filing its Notice of Appeal. The District Court has failed to afford the relief requested and has denied, without opinion, motions of the University of Alabama and the State of Alabama for a stay of execution of the Order in conjunction with their requests for certification of controlling questions of law pursuant to 28 U.S.C. § 1292(b), which were

[6]*See* pp. 15-18, *infra*. In rejecting a challenge to the creation and operation of AUM, the *ASTA* court also sanctioned the operation by AUM of academic programs in business and education. In disregard of *ASTA*, the court below found that these programs unnecessarily duplicate similar programs at ASU. *See ASTA*, 289 F.Supp. at 788.

also denied by the Court, without opinion. In its present posture, further delay by Auburn in filing the instant motion while awaiting favorable action on its petition with the trial court is not practicable because the need for relief is immediate and because the prior actions of the district judge indicate the improbability of a stay by the trial court of its own Order. *See e.g. McCoy v. Louisiana State Board of Education,* 332 F.2d 915 (5th Cir. 1964).

III. IRREPARABLE HARM AND THE PUBLIC INTEREST.

The trial court's Opinion and Order have caused and will cause irreparable harm to Auburn if not stayed pending appeal because of its drastic and wide-ranging condemnation of Auburn's policies and programs. The mere existence of the Opinion and Order, and the publicity attendant thereto, is disruptive to Auburn's current and prospective students, faculty and staff, as well as scientists in the Alabama Agricultural Experiment Station and employees of the Alabama Cooperative Extension Service, because it casts grave doubts on the continued viability of Auburn's curriculum, high academic standards, and public service function.

The necessary and logical conclusion of the trial court's Opinion and Order is that Auburn's supervision and control of the Alabama Cooperative Extension Service and the Alabama Agricultural Experiment Station will somehow be substantially altered (Opinion at 56, 60-62),[7] and that education

[7]A&M's Amended Claims (*See* Appendix Three) seek the fragmentation of the ACES and AAES so that A&M has control of both organizations in the northern thirty-three counties of Alabama. The district court apparently intends to so divide ACES and AAES (Opinion at 56, 60-62) in spite of the evidence that no state so divides such agencies and the uncontradicted testimony of the Vice-President, Emeritus for Agriculture at Ohio State University and the Dean of Agriculture and Director of Extension and Research at Cornell University that for scientific and economic reasons, administrative responsibility for such state agencies should not be divided. (Trial testimony of Roy Kottman and Dr. David Call).

and business programs at AUM will be substantially altered because of the court's finding that they unnecessarily duplicate programs at ASU (Opinion at 75). This prospect creates many uncertainties – the possibility of lost jobs and tenure for administrators, teachers and scientists and the possibility that students may not graduate in the institutions of their choice if they remain in the programs in which they are currently enrolled or intend to enroll – and is doing irreparable and irreversible harm to Auburn University every day during which the court's Opinion continues to be viable authority. This problem is seriously compounded by the trial judge's gratuitous and erroneous statements that "Black student participation in campus life and activities at Auburn is at a lower level than that of any other state supported institution," (Opinion at 73) and that "Auburn's racial attitudes have changed little since the fifties." (Opinion at 73-74).[8] Such rhetoric seriously handicaps Auburn's attempts to recruit qualified black faculty and students. Once potential faculty members or prospective students have chosen another institution, they are lost to Auburn forever.

The Memorandum of Opinion declares that the Alabama constitutional provision vesting sole management and control of Auburn in its Board of Trustees is violative of the fourteenth amendment to the United States Constitution (Opinion at 91). Then, in ordering the state defendants to formulate a plan, the Order subordinates Auburn's Board of Trustees to the state defendants, contrary to the Alabama Constitution of 1901 and in violation of the tenth amendment to the United

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[8]The only evidence on the participation by blacks in student life at Auburn came from former Auburn students Cheryl Harvey and Abbie Hockaday, both of whom testified that they had experienced no impediment to campus life or student activities. (*See* Transcript of Harvey and Hockaday testimony, attached hereto in Appendix Six). That Auburn's racial attitudes *have* changed since the fifties is established by uncontradicted evidence that Auburn actively recruits minority students and faculty. (*See* Deposition of Herbert N. Hawkins, Auburn trial Exhibit 5947, and Auburn Trial Exhibit 8221, all attached hereto in Appendix Six).

States Constitution (Order at 1). Because Auburn's business relationships and educational policy have traditionally been predicated upon its constitutional autonomy, the abolition of this authority could seriously erode the ability of Auburn to conduct day-to-day business, academic affairs, and educational policy.

The court has declared Auburn's use of American College Testing Program (ACT) scores in admissions decisions violative of Auburn's duty to desegregate. This conclusion is based not only upon an erroneous application of relevant legal principles but also upon a total disregard of uncontradicted testimony proving Auburn's use of the ACT to be academically sound and constitutionally permissible.[9] Nevertheless, the mere suggestion in the Opinion that Auburn must dilute its admissions standards is working irreparable damage to Auburn by discouraging superior students, black and white, from selecting Auburn.

The trial court's Opinion and Order will force drastic changes in the academic policies, programs and reputation of Auburn. The expectation of these changes is already damaging Auburn because of the fears of current and prospective students that they will not be able to graduate from the same institution and in the same program in which they matriculated. The difficulty of returning an organization ordered to be drastically altered to its former status in the event of reversal has been considered an important factor in determining whether a stay pending appeal shall be granted. *See, e.g., United States v. First City National Bank,* 386 U.S. 361, 370-71 (1967) (difficulty of "unscrambling" merged institutions cited as ground for stay); *International Boxing Club v. United States,* 2 L.Ed. 2d 15, 78 S.Ct. 4 (1957) (Harlan, J., Circuit Justice). Since a stay is necessary to prevent this harm, the proper time for the

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[9]*See* p. 34, *infra; see Regents of University of Michigan v. Ewing,* 54 U.S.L.W. 4055 (1985) ("Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms' of a university.").

Court of Appeals to act is now, before the proceedings below have gone any further.[10]

Conversely, preservation of the status quo pending appeal would not harm the plaintiffs or the public interest in the event the trial court's decision is affirmed. There is no evidence that anyone is being denied the benefits of any program because of race (*See* notes 3 and 8, *supra* and notes 15 and 20, *infra.*), and the institutional defendants are not legally subject to injury. Review prior to the initiation of expensive discovery and hearings concerning the elements of the plan might avoid the expenditure of public funds on litigation. The balance of the equities clearly favors a stay.

IV. LIKELIHOOD OF SUCCESS ON THE MERITS.

The law of this circuit is that an applicant for a stay of a district court judgment "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) *cert. denied* 103 S. Ct. 1438, ... U.S. ....., 75 L.Ed. 2nd 795 (1981). The grounds for Auburn's appeal will be embraced in two general headings, *viz.*; (1) errors in the court's legal conclusions[11] and evidentiary findings and (2) error in denying Auburn's recusal motion under the facts as set out in Auburn's 28 U.S.C. § 144 affidavit and as presented at the hearings on recusal.

Auburn will establish that the district court's Opinion applies incorrect legal principles, because it fails to follow a

[10]Stay of further proceedings below is necessary only if the trial court disregards Auburn's Notice of Appeal, in which case stay would avoid proceedings on a writ of prohibition, *see* note 1, *supra*, or if this court notes jurisdiction of Auburn's appeal only

[11]Whether the trial court is bound by the *ASTA* decision and whether the trial court has jurisdiction of claims relating to the AAES and ACES given the program-specific limitations of Title VI are among issues that have not been previously decided by this court and which justify a stay of the trial court's Order. *See Corpus Christi-Independent School Dist. v. Cisneros* (Black, J., Circuit Justice), 404 U.S. 1211 (1971).

decision by the United States Supreme Court involving the identical issues and virtually the same parties, fails to follow decisions of this circuit dealing with the fourteenth amendment rights of state agencies, fails to follow decisions of the United States Supreme Court and this circuit dealing with the "program-specific" requirements of Title VI; and is clearly erroneous because the evidence presented during the trial of this action established that race played no part in the adoption of the Alabama constitutional provisions vesting management and control of Auburn University and the University of Alabama in their respective Boards of Trustees, that AUM has been a race-neutral institution since its creation, that Auburn's status as administrator of the Alabama Agricultural Experiment Station and the Alabama Cooperative Extension Service has nothing to do with race, that Auburn's use of the ACT test in its admissions process is valid and legitimate, and that Auburn actively recruits black faculty.

Auburn will also establish that the denial of its motion for recusal of the trial judge was based upon a failure of the court below to follow the express legal conclusion of this court that Auburn's affidavit, pursuant to 28 U.S.C. § 144, set forth "sufficient factual allegations to require that the judge shall proceed no further therein." Additional factual support for the trial judge's disqualification, discovered since Auburn's motion was overruled, provides further support for the contention that the trial judge is biased against Auburn as well as against others for whose actions the United States contends Auburn is to be held accountable.[12]

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[12]The United States has never cited or relied on "institutional" violations of Title VI; indeed, the Department of Education investigation found none. Rather, the United States has focused throughout on an approach that disregards institutional innocence, contrary to *Grove City v. Bell*, 465 U.S. _____, 79 L.Ed.2d 516, and for that reason bias of the trial judge for or against any institution, agency or official of higher education in Alabama has the potential to impact upon Auburn University under the United States' approach to this case.

A. The *ASTA* Decision Is Binding Upon The Court As *Stare Decisis* And Bars, Under The Doctrines Of *Res Judicata* And Collateral Estoppel, Relitigation Of The Claim That AUM Unconstitutionally Impedes The Desegregation of ASU.

1) *Stare Decisis.*

In making its finding of liability, the district court expressly disregarded[13] the teachings of *Alabama State Teacher's Association v. Alabama Public School and College Authority*, 289 F.Supp. 784 (M.D. Ala. 1968) *aff'd* 393 U.S. 400 (1969) (*ASTA*). The importance of *ASTA*, a decision of a three-judge court from the Middle District of Alabama that was summarily affirmed, is twofold. First, the *ASTA* court established broad, binding precedent on the nature and scope of the affirmative duty to disestablish a former dual system of public higher education. In rejecting contentions by a coalition of black plaintiffs affiliated with ASU[14] that the creation of

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[13]*Citing Hardwick v. Bowers*, 760 F.2d 1202, 1207 (11th Cir. 1985), the trial court held that "doctrinal developments," consisting of summary affirmance of the United States Supreme Court; *Board of Visitors v. Norris*, 404 U.S. 907 (1971); a decision of the Sixth Circuit Court of Appeals, *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), *cert denied*, 444 U.S. 886 (1979); and another decision of a three-judge district court; *Lee v. Macon*, 317 F.Supp. 103 (M.D. Ala. 1970), were sufficient indications of a change in the law to reject the teachings of *ASTA*. Opinion at 95. *Hardwick*, however, does not support the court's conclusion because it holds that a lower court may decline to follow a summary affirmance of the Supreme Court only when the *Supreme Court* has indicated a change of position in "a *decision announced in a written opinion after consideration of briefs and oral argument.*" None of the "doctrinal developments" cited by the trial court satisfy this standard.

An additional reason cited by the court for rejecting *ASTA* was that the United States Office of Education now "requires" more than race-neutral admissions, something HEW did not do at the time of *ASTA*. As a matter of fact, reference to these "newer standards" relied upon by the court in its order were stricken on January 17, 1986 as minimum standards for the plan when all parties pointed out to the court that they had no legal effect.

[14]*See* footnote 18, *infra.*

AUM[15] would impede the desegregation of ASU, and thus be inconsistent with the affirmative duty to desegregate, the *ASTA* court held:

> "As long as the state and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied."

289 F.Supp. at 789-80.

The *ASTA* court distinguished the case before it from cases involving the desegregation of primary and secondary schools, holding that fundamental differences in diversity of goals, programs, teacher training and living arrangements between primary and secondary schools on the one hand and colleges on the other compelled a narrowing of the scope of the duty to desegregate in the higher education context. *See* 289 F.Supp. at 287. These primary and secondary school desegregation decisions, which cast "doubt on the continued viability of freedom of choice in the public schools," do not apply "to the operation of an education system on a college level. Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps perform an important function, *viz.*, fitting the right school to the right student." 289 F.Supp. at 790.[16]

The trial court in the instant action concluded that it was not bound by the summary affirmance of the United States Supreme Court in *ASTA* and held, in effect, that race-neutral admissions and hiring are insufficient to fulfill an institution of higher education's duty to desegregate. If this conclusion is

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[15]AUM was created after legal segregation ended in Alabama. It has never discriminated in hiring or admissions on the basis of race and it is one of the most integrated institutions of higher education in the state (Opinion at 74).

[16]*ASTA* is a particularly strong precedent in connection with the claims relating to AUM in this case since the parties, issues and facts are, for all practical purposes, identical.

in error, as Auburn contends, then the court's Opinion and Order fall.

Even if the district court is correct in saying that the law of desegregation in the higher education context has changed since the time of *ASTA*, the decision still has great significance, because it binds the court under the doctrines of *res judicata* and collateral estoppel as to the claims raised by the plaintiffs concerning the effect of AUM on the desegregation of ASU.[17]

ii) *Res Judicata.*

The elements necessary to establish a *res judicata* defense were present in the court below as to the claims related to AUM. First, the claims in *ASTA* are indistinguishable from the claims in the instant case. Both cases involve the basic claim that the existence and operation of AUM violates the "duty" to dismantle the formerly segregated "dual system" of higher education and impedes the ability of ASU to desegregate. The claims in both cases arise from the "same nucleus of operative facts" (the creation and operation of AUM and its alleged affect on Alabama State); the rights claimed in both suits are the same (the right to have the alleged vestiges of segregation removed from Alabama State University and from the "system" of higher education in Alabama); the claimed wrongs are the same (the existence and operation of AUM impeding the ability of Alabama State, and thus the "system," to desegregate); and the relief sought is the same (prohibition, limitation or elimination of the existence of AUM). *See*

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[17]Under the doctrine of *res judicata*, a final judgment on the merits of an action precludes the parties or those so closely aligned with their interests as to be their virtual representatives from relitigating issues that were or could have been raised in that action. *See Delta Airlines, Inc. v. McCoy Restaurants, Inc.*, 208 F.2d 582, 583 (11th Cir. 1983); *Aero-Jet General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (1925). Under the doctrine of collateral estoppel, once the court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *See Alan v. McCurry*, 449 U.S. 90 (1980); *Montana v. United States*, 440 U.S. 147 (1979).

Woods Exploration and Producing Company v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971).

The second level of analysis of Auburn's *res judicata* defense to the AUM-related claims concerns the parties. The analysis discloses that, while the parties in *ASTA* and in the present case are not identical, they are so closely aligned in interest that *res judicata* should clearly be applied.[18]

The claims of ASU and the Plaintiffs-Intervenors — who technically were not parties in *ASTA* — are barred because their interests were adequately represented in the *ASTA* proceedings. ASU, in particular, had extensive representation in *ASTA*. For example, Dr. Joe Reed, a named Plaintiff in *ASTA*, was identified in the *ASTA* complaint as "an alumnus of Alabama State." Reed, who was also the Executive Secretary of the Alabama State Teacher's Association (another *ASTA* Plaintiff whose membership, according to the *ASTA* complaint, consisted primarily of graduates of Alabama State), selected the lawyers to represent the *ASTA* Plaintiffs and was their principal contact throughout that litigation. In the present case, Reed — now a member of ASU's Board of Trustees — has been actively involved in the direction and control of the claims made by ASU and the Plaintiffs-Intervenors (Deposition of Robert A. Dentler, pp. 48-49, Auburn Exhibit 8087A, attached hereto in Appendix Seven). Exactly the same theories advanced directly by ASU in this case were advanced on behalf of ASU in the *ASTA* case by Reed and the other Plaintiffs, who were all closely affiliated with ASU. Further, the principal witness for the Plaintiffs at the *ASTA* trial was Dr. Levi Watkins, then President of Alabama State; and the same lawyer represented the Plaintiffs in *ASTA* and Alabama State in the present case.

Similarly, the interests of the present Plaintiffs-Intervenors and the class they represent (graduates of ASU, black students

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[18]*See Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir. 1975) ("Under federal law of *res judicata*, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.")

or potential students in the Montgomery area, and potential black employees of the Montgomery institutions), were represented by the named Plaintiffs in *ASTA,* who included alumni, students and supporters of Alabama State representing "that class of race or person commonly designated and referred to as Negroes." Thus, not only were the named Plaintiffs in the two cases virtualy identical, so also were the plaintiff classes. (*See* Appellant's Jurisdictional Statement in *Alabama State Teachers Association v. Alabama Public School and College Authority* in the Supreme Court of the United States, attached hereto in Appendix Seven).

Finally, the record will show that ASU and the Plaintiffs-Intervenors pursued the present litigation jointly and cooperatively, which makes it even more appropriate to apply the *res judicata* bar to both.

iii) Collateral Estoppel.

The doctrine of collateral estoppel, which bars relitigation of issues previously decided adversely to the party against whom the doctrine is asserted, would work to bar the AUM-related claims if the claims in the instant case were determined to be upon a "different cause of action but which involved issues actually litigated and necessary to the outcome of the first action." *See Parklane Hosiery Company v. Shore,* 439 U.S. 322, 326, n. 5 (1979). If, for instance, ASU and the Knight Intervenors argue that *res judicata* is inapplicable because *ASTA* and the present suit involved different claims or causes of action, collateral estoppel would nevertheless preclude litigation of certain key factual and legal issues upon which the plaintiffs would have to prevail in order to be entitled to any judicial relief.[19]

[19]Collateral estoppel would, for example, bar re-trial of the basic issue of whether the creation and operation of AUM violates whatever duty

In summary, while it is not necessary to resort to the collateral estoppel doctrine to establish a defense, it would be appropriate to do so. And, regardless of the preclusion doctrine applied, the result is the same — the AUM-related claims and contentions are barred.

B. The District Court Lacked Jurisdiction Over Claims Concerning Auburn's responsibility For The Administration Of The Alabama Cooperative Extension Service And The Alabama Agricultural Experiment Station.

The AAES and the ACES were established in 1883 and 1915, respectively, by the State of Alabama and responsibility for their administration was vested in Auburn University. Both organizations receive federal financial assistance administered by the Department of Agriculture, which is responsible for insuring their compliance with Title VI of the Civil Rights Act of 1964. Neither organization receives federal financial assistance under statutes administered by the Department of Education nor does the Department of Education have Title VI administrative authority with respect to them. (*See* 34 C.F.R. Part 100; 7 C.F.R. Part 15, attached hereto in Appendix Nine).

This action was commenced by the Attorney General and the United States Department of Justice by virtue of a finding by the United States Department of Education

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might exist to disestablish and dismantle the former "dual system" of higher education, an issue addressed and decided in *ASTA*. Similarly, the present complainants may not relitigate the previously-decided issue of whether AUM's existence and operation, including its offering of education and business pograms, which were held unnecessarily duplicative by the court below, unlawfully impede the ability of ASU, and thus the state, to desegregate its higher education facilities. On a slightly different level, ASU and the Knight Intervenors cannot try again to litigate the issue of the intent behind the establishment of AUM, an issue addressed by the *ASTA* court and specifically decided adversely to the *ASTA plaintiffs*. See 289 F.Supp. at 788-89.

that "the State of Alabama has violated Title VI by failing to eliminate the vestiges of its dual system of higher education."[20] That finding was based upon an investigation by the Department of Education's Office of Civil Rights that *did not* include a review of the ACES or AAES. (*See* Auburn Trial Exhibit 8041J, included in Appendix Eight.) On January 4, 1982, the Department of Education requested the Department of Justice to commence the present action to effect compliance pursuant to Department of Education regulations at 34 CFR § 100.8 (a) (d) (Appendix Eight). This regulation, by its terms, applies only to programs to which federal financial assistance is authorized to be expended to a recipient under a law ad-

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[20]Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (d) *et seq.*, provides at 42 U.S.C. § 2000 (d-1), that compliance with Title VI may be effected by either: (1) the termination of financial assistance to any program or activity found to be in noncompliance with the requirements of Title VI or "(2) by another means authorized by law: *provided however* that no such action shall be taken *until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.*" (Emphasis added.) Title VI and the agency regulations promulgated for its enforcement require findings of violations in particular programs operated by the recipient of federal financial assistance. *See Grove City College v. Bell*, 465 U.S. _____, 79 L.Ed.2d 516, 531 (1983); *Board of Public Instruction v. Finch*, 414 F.2d 1068, 1075 (5th Cir. 1969).

The Department of Education investigation that precipitated this action focused neither on whether particular programs that receive federal financial assistance were in violation of Title VI nor whether particular recipients of federal financial assistance, the individual institutions, were guilty of Title VI violations. (*See* Auburn's Amended Statement of Undisputed Facts, No. 256 A&M, attached hereto in Appendix Four). The trial court refused to allow discovery of whether the Department of Education investigation found individual institutions innocent of Title VI violations. The Northern District of Georgia, however, during depositions in Atlanta, forced the United States to produce the documentation of its investigation. This documentation indicated that no violations were found in specific programs or at any specific institutions. (*See* Auburn's Amended Statement of Undisputed Facts, No. 59).

ministered by the Department of Education. *See* 34 CFR § 100.2 (Appendix Eight). The referral could not have included findings relative to the AAES or ACES.

The regulations promulgated by United States Department of Agriculture pursuant to Title VI, at 7 CFR Part 15 (Appendix Eight), also provide that before Title VI enforcement proceedings are commenced by the Department of Justice against a recipient of federal financial assistance under a statute administered by the Department of Agriculture, the Secretary of Agriculture must determine that the recipient is not in compliance and that compliance cannot be secured by voluntary means. 7 CFR § 15.8 (d) (Appendix Eight). The United States Department of Agricultural has made no determination that the ACES or AAES are being operated in violation of Title VI. Neither has the Secretary of Agricultural requested the Department of Justice to proceed against Auburn because of any failure of the AAES or ACES to comply. (*See* United States Responses to Auburn's Request for Admissions, Auburn Trial Exhibit 5672, Nos. 19-21, attached hereto in Appendix Four). Indeed, the Department of Agriculture has found the AAES to be in compliance with Title VI on each occasion in which the Department has conducted a compliance review, (*See* Deposition of Curtiland Deville, Auburn Trial Exhibit 5921, at pp. 15-23, 79, attached hereto in Appendix Eight), and the ACES is in full compliance with court-ordered desegregation by the United States District Court for the Middle District of Alabama in the case of *Strain v. Philpott,* CV-840-E.[21] 42 U.S.C. § 2000 (d), 2000 (d-1) and the regulations promulgated thereunder by the various federal departments charged with enforcing those statutes, clearly limit the re-

[21]The ACES continues to be subject to the jurisdiction of the court in *Strain v. Philpott* (Appendix Eight).

quirements of Title VI of the Civil Rights Act of 1964 to specific "program[s] or activity[ies] receiving federal financial assistance." *See Grove City College v. Bell,* 465 U.S. ____, 79 L.Ed. 2nd 516, 531 (1984) (*"Grove City"*). Logically, any relief ordered under those statutes must be tailored to the specific program or activity found to be in violation of the statute – violations found in one program do not trigger relief against other programs. *See Grove City* at 79 L.Ed. 2d 531; *Board of Public Instruction v. Finch,* 414 F.2d 1068 (5th Cir. 1969). Because the agency responsible for compliance by the AAES and ACES with Title VI has made no determination that they are in non-compliance and has not referred any matter relating to Auburn, the AAES or the ACES to the Department of Justice with a recommendation that it institute enforcement proceedings; the program-specific limitations of Title VI deprive the United States of authority, jurisdiction or standing under Title VI of the Civil Rights Act of 1964 to challenge the organization, policies or practices of Auburn with respect to the AAES or ACES. *See* 7 CFR Section 15.8; *Finch,* 414 F.2d at 1076. Absent such statutory authority, the United States may not assert its fourteenth amendment claims. *See United States v. City of Philadelphia,* 644 F.2d 187 (3rd Cir. 1980). Since the United States is without authority to challenge these programs, the trial court had no jurisdiction to deal with such programs in its Opinion and Order.[22]

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[22]The only other plaintiff to assert claims related to the ACES and AAES was A&M, which, because it is an entity of the State of Alabama, has no rights under the fourteenth amendment upon which to base its claims. *See* pp. 28-30, *infra.*

C. The Plaintiffs Are Barred By The Doctrine of *Res Judicata* From Asserting Claims In This Action Relating To The Organization, Policies Or Practices Of The Alabama Cooperative Extension Service.

Since 1971, the ACES has been operated pursuant to court order in the action of *Strain, et al. v. Philpott, et al.*, CV-840-E in the Middle District of Alabama. In *Strain*, the United States alleged that the elimination by Auburn of the former "negro branch" of the ACES failed to eliminate the vestiges of racial segregation in the provision of agricultural extension services. The court characterized the issues and claims as, inter alia:

> The thrust of plaintiffs' Complaint is: (1) that ACES has provided and continues to provide its services on a racially segregated and discriminatory basis; (2) that the ACES has discriminated and continues to discriminate against Negroes in hiring and promotion and in terms and conditions of employment; . .

The court entered a decree in *Strain* designed to not only "prohibit discrimination" but also to "prescribe procedures designed to prevent discrimination in the future and eliminate the effects of past discrimination." (*Strain* Opinion of September 1, 1971, Auburn Trial Exhibit 8041K, at p. 13, attached hereto in Appendix Eight). The decree entered by the court ordered ACES to, *inter alia*, make such organizational changes as are necessary to eliminate any segregation in the provision of extension services to the public and any discrimination in hiring and promotion practices. (*Strain*, Decree of September 1, 1971, Auburn Trial Exhibit 8041C, attached hereto in Appendix Eight).

The plaintiffs in *Strain* included a class described as "all

Negro citizens[23] of the State of Alabama" and the Attorney General of the United States. The defendants included Auburn University's president, its Board of Trustees, and the director of the Alabama Cooperative Extension Service.

The *Strain* court, in numerous opinions since the entry of its initial opinion and decree, has held the ACES to be in full compliance with its prior orders requiring elimination not only of current discrimination on the basis of race, but also the effects of prior discrimination. (*See* Order of February 14, 1972, Auburn Trial Exhibit 5827; Order of June 11, 1976, Auburn Trial Exhibit 5857; Order of June 10, 1977, Auburn Trial Exhibit 8041I; Order of April 22, 1981, Auburn Trial Exhibit 5861; all attached hereto in Appendix Eight). The organizational structure of the ACES, which the district court Order found to be racially tainted was approved by the court in *Strain* on June 11, 1976, with the consent of the United States. (*See* Order of June 11, 1976).

Claims relating to the alteration of the ACES' organizational structure, and the relief ordered by the court, are clearly barred by the *Strain v. Philpott* proceedings under the doctrine of *res judicata*.[24] The proper forum for these claims is in the Middle District of Alabama in the *Strain* court. The Court's consideration of the claims below is, therefore, in error.

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[23]If, as A&M contends, it is entitled to protection under the fourteenth amendment and Title VI, then it follows that it was a member of the plaintiff class in *Strain*. A&M's position that it is a "person" within the meaning of the fourteenth amendment and Title VI is predicated upon its characterization of itself as a "black institution." It may not claim to have the same rights as a black person and, at the same time, claim it was not a member of the plaintiff class in *Strain*.

[24]*See* note 17, *supra*.

D. As Instrumentalities Of The State Of Alabama, ASU And A&M Have No Rights Under The Fourteenth Amendment Of The United States Constitution, 42 U.S.C. § 1981, 42 U.S.C. § 1983 or Title VI Of The Civil Rights Act of 1974.

In their Complaints, and in every statement of position throughout this action, A&M and ASU have asserted that they, as institutions, have been discriminated against by the defendants. This is evidenced, for example, by Exhibit One to ASU's Motion for Realignment which states that "the Board of Trustees of [ASU] reaffirms the position that seniority of [ASU] as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan," and by Paragraph 23 of A&M's Amended Claims where it seeks its own right to equality with Auburn University, to "large sums of money," to "enhancement" and to be an "equal partner" with Auburn in the AAES and the ACES.[25] (*See* ASU Motion for Realignment and A&M Amended Claims, both attached hereto in Appendix Three).

Because they are instrumentalities of the State, ASU and A&M have no rights under the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1981, § 1983 or Title VI of the Civil Rights Act of 1964. *See e.g. Trenton v. New Jersey,* 262 U.S. 182 (1923); *Drayden v. Needville Independent School District,* 642 F.2d 129 (5th Cir. 1981); *Appling County v. Municipal Electric Authority of Georgia,* 621 F.2d 1301 (5th Cir.) *cert denied,* 449 U.S. 1015 (1980); *Triplet v. Tiemann,* 302 F.Supp. 1239 (Neb. 1969).

The United States Supreme Court's holding in *Monell*

[25]In response to the State of Alabama's interrogatory, A&M stated that the basis for bringing this action pursuant to 28 U.S.C. § 1983, is that it is a "beneficiary protected by § 1981 and § 1983 in that it is a traditionally black institution."

v. New York City Department of Social Services, 436 U.S. 658 (1978), that political subdivisions of states could be *sued* under 28 U.S.C. § 1983, which has been repeatedly relied upon by A&M and ASU and which was cited by the trial court for the proposition that A&M and ASU *do* have constitutional rights, has no relevance to this issue. In *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir.), *cert denied* 449 U.S. 1015 (1980), the old Fifth Circuit Court of Appeals, faced with the claim by a political subdivision of the State of Georgia against another agency of that state, held as follows:

> "The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amendable to suits brought under that section. The *Monell* decision does not call into question the principal that a city or county cannot challenge a state statute on federal constitutional grounds."

621 F.2d at 1308. *See also Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Title VI prohibitions are identical to those of Fourteenth Amendment); *Drayden v. Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981) (Title VI is intended to protect rights of "individual citizens").

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) is cited by the plaintiffs and relied upon by the trial court in holding that A&M and ASU are "persons" within the meaning of 42 U.S.C. § 1983. *Washington*, however, does not address the question presented here, whether institutions, as such, have fourteenth amendment rights. The fact situation in *Washington*, fits neatly into the category of cases represented by the *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (5th Cir. 1956) and *Akron Bd. of Ed. v. State Bd. of Ed. of Ohio*, 490 F.2d 1285 (6th

Cir.), *cert. denied,* 417 U.S. 932 (1974), which hold that local school boards have standing, in the Article III sense, to sue the state in order to protect the rights of their students from state legislation that would have a segregative effect and that would place board members in the position of violating either state law or the Federal Constitution. These cases do not hold that the school boards themselves have fourteenth amendment rights and are inapposite to the issue raised here.

E. The Trial Judge Should Have Been Disqualified.

In ruling on Auburn's Petition for a Writ of Mandamus disqualifying the trial judge, the Eleventh Circuit held that Auburn's affidavit pursuant to 28 U.S.C. § 144 "sets forth sufficient factual allegations to require that the judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144. The Court noted in a footnote that it, in ruling on Auburn's Petition, had to accept the allegations of the affidavit as true. The Court remanded the matter for proceedings before another trial judge, apparently for the purpose of determining whether the allegations were true, since its decision that the affidavit set forth sufficient factual allegations to require the trial judge to be disqualified left no legal issues to be decided. The record will demonstrate that the judge who eventually denied Auburn's motion, Judge David W. Dyer, did not find that the facts presented in the § 144 affidavit were untrue but, rather, held that the affidavit did not set forth factual allegations sufficient to require the recusal of the trial judge, contrary to the holding of this Court.[26] Failure to follow the "law of the

[26] Judge Dyer stated in his opinion that "the averments of the affidavits are insufficient, as a matter of law, to require disqualification under § 144." *See* Opinion on Motions for Recusal, March 16, 1984 at 2; attached hereto in Appendix Five).

case" in this manner was reversible error on the part of the court below.

Subsequent to the proceedings on Auburn's motions for disqualification, in June of 1984, the United States District Court for the Northern District of Georgia compelled the United States to produce documents requested by Auburn during depositions of United States Department of Education personnel in Atlanta. These documents included a newspaper clipping, Exhibit A to Auburn's Notice of Appeal, which relates the trial judge's actions while a member of the Alabama State Senate in leading a filibuster, on racial grounds, in opposition to the appointment of a white person as a member of the Board of Trustees of predominantly black ASU. The existence of this document was unknown to this defendant at the time the recusal motions were being considered, and it is obviously relevant on that issue.[27]

F. The Trial Court Based Its Opinion And Order On Clearly Erroneous Findings Of Fact.

Although Auburn takes issue with many of the court's findings of fact,[28] Auburn takes special exception to three

[27]It is also relevant on the merits. Dr. Steven Wright, a United States expert witness, gave opinion evidence that racial integration of institutional governing boards is important to the elimination of racial identifiability of student bodies. The article was made an exhibit to Dr. Wright's Deposition, but the trial court refused to permit cross-examination of the witness on this issue and refused to allow the deposition and its exhibits to be introduced into evidence at trial. In the trial court's Memorandum Opinion, the racial identifiability of institutional governing boards, including ASU's, was considered "probative" to the "question of whether the dual system has been disestablished." (Opinion at 62, 75). The fact that the "governor has generally appointed blacks to the board" was characterized as a vestige of segregation. (Opinion at 75).

[28]For instance, the court found that Auburn makes no special effort to recruit black faculty, that Auburn's attitudes with regards to integration have changed little since the 1950s, *see* note 8, *supra*, that the state's

of the Court's findings that have no support in the record and upon which the only evidence presented was contrary to the Court's finding.

First, the Court held that the difference between Auburn and A&M in the area of agricultural extension and research was principally the product of racial discrimination.[29] Dr. William Warren Rogers, the only historian to testify in the case, testified that just the opposite was true, stating that race was not a motivating factor in the legislature's assignment to Auburn of its land grant status in 1871, of the Alabama Agricultural Experiment Station in 1883 or the Alabama Cooperative Extension Service in 1915. (Dr. William Warren Rogers Deposition, Auburn Trial Exhibit 8399 at pp. 27-44, attached hereto in Appendix Eight). This testimony is uncontradicted.

Second, the Court held that the provision in the Ala-

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allocation of financial resources has disfavored A&M and ASU, that the business and education programs at AUM unnecessarily duplicate those at ASU and that the state's choice of resource allocation for physical facilities impaired the ability of ASU and A&M to attract white students, in spite of the undisputed fact that A&M and ASU have been treated as well as or better than any traditionally white institution of similar size and mission. (See Report of Douglas R. Sherman, University of Alabama Trial Exhibit 1034, attached hereto in Appendix Ten; Reports of Mary McKeown, Auburn Trial Exhibit 8358 and 1359, attached hereto in Appendix Nine). The court's finding is based upon a comparison of A&M and ASU with dissimilar institutions, contrary to the procedures of the Department of Education for Title VI investigations. (*See* Exhibit 117 to Deposition of William H. Thomas, Auburn Trial Exhibit 5922, attached hereto in Appendix Nine).

[29]This finding was based upon other clearly erroneous findings. For instance, in order to support its conclusion that A&M would have been an appropriate place to direct federal funds for agriculture, the court noted that the heaviest concentration, numbering over one hundred, of A&M's college students in 1913 were enrolled in its agricultural courses (Opinion at 31). A&M's own interrogatory answers, however, and a report of the United States Department of the Interior published in a 1916 show that A&M had *no* college students in 1913 and that of its 73 secondary students only six indicated agriculture as their chosen trade. *See* State of Alabama Exhibit 141; Auburn Ex. 5562, both attached hereto in Appendix Eight).

bama Constitution of 1901 for Boards of Trustees for the University of Alabama and Auburn, when A&M and ASU were not so provided, was racially motivated (Opinion at 91). Again, Dr. Rogers testified that there was absolutely no racial motivation behind the provision for of Auburn and University of Alabama in the constitution of 1901 and no witness testified to the contrary. (Rogers Deposition at pp. 27-44).

Finally, the trial court completely missed the mark in its finding regarding Auburn's use of ACT scores in its admissions decisions. The court found that Auburn's use of the ACT — on which blacks on average score lower than whites — was inappropriate, apparently because of evidence that a prospective student's high school grades, considered alone, are a better predictor of college success than the same student's ACT score, considered alone. However, the evidence — which consisted of the testimony of Auburn's Director of Institutional Analysis, a report prepared at Auburn concerning the validity of the ACT at Auburn, and various reports concerning the validity of the ACT generally — established without contradiction that Auburn's admission process considers the ACT score in conjunction with high school grades, and that the two taken together are a superior predictor of academic success at Auburn University — as elsewhere — than either criterion considered alone.[30] (*See* Transcript of Testimony of Gerald S. Leischuck and Auburn Trial Exhibit 7464, both attached hereto in Appendix Ten).

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[30]The Eleventh Circuit has upheld the use of standardized tests for student assignment where shown to be justified by educational necessity and where the results on such tests are not shown to be affected by past discriminatory practices. *See Georgia State Conference of Branches of NAACP v. State of Georgia,* 775 F.2d 1403 (11th Cir. 1985). Auburn's higher admissions and transfer requirements were held by the *ASTA* court to be a valid distinction between Auburn and ASU. *See* 289 F.Supp. at 789.

WHEREFORE, Auburn prays that the mandate of the the United States District Court for the Northern District of Alabama be stayed pending the decision of the Eleventh Circuit Court of Appeals on the merits of this action.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon the following attorneys by first-class United States mail, postage prepaid, on this 13th day of February, 1986:

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/s/ EDWARD S. ALLEN

Of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, et al.,
Plaintiffs-Appellees,

JOHN F. KNIGHT, Jr., et al.,
Plaintiffs-Intervenors,
Appellees,

versus

THE STATE OF ALABAMA, et al.,
Defendants,

THE ALAMAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE,
State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(June 6, 1986)

Before VANCE and JOHNSON Circuit Judges, and ALL-GOOD*, Senior District Judge.

JOHNSON, Circuit Judge:

We review here the district court's decision to enjoin the Alabama State Board of Education ("the Board") and its members from refusing to recertify certain Alabama State University (ASU) teacher education programs. We

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black tdults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these issues were severed from the main state-wide action and set for later trial.

Meanwhile, during the pendency of these proceedings,

the state Board voted not to recertify certain undergraduate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolution of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory – that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983 or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as amicus curiae, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,[1] we may examine our jurisdiction

[1]In its memorandum opinion in the state-wide action, however, the lower court said:

> The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama – sued the State of Washington under the Fourteenth Amendment. There the Supreme

sua sponte. *In Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985). Logic dictates that parties who seek a preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, *e.g.*, *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); and *Hunter v. City of Pittsburg*, 207 U.S. 161 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that "public entities which are political subdivisions of a state" are "creatures of the state, and possess no rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976). However, the latter interpre-

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Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

tation — which would bar any suit by a creature of the state against its creator — has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the *Hunter* line — including *Safety Harbor, supra* — and concluded that "these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state." *Rogers v. Brockette,* 588 F.2d 1057, 1068 (5th Cir. 1979), *cert. denied,* 444 U.S. 827 (1979). The Fifth Circuit panel relied in part on the Supreme Court's statement in *Gomillion v. Lightfoot,* 364 U.S. 339, 344 (1960), that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the constitution considered in those cases." *Id.*

Thus, no per se rule applies in this Circuit.[2] In assessing the standing to sue of a state entity, we are bound by the Supreme Court's or our own Court's determination of whether any given constitutional provision or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review de

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[2]*Cf.* City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 449 U.S. 1039, 1042 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with Board of Education v. Allen, 392 U.S. 236 (1968), in which one of the appellants was a local board of education.

But see City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1982); P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System (2d ed.) 182 (1973), in which a per se rule is contemplated. *See also* Aguayo v. Richardson, 473 F.2d 1090, 1100 (2d Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974), for an indication of the confusion surrounding this issue.

novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.[3] As long ago as 1939, the Supreme Court in *Coleman, supra,* at 441 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *See also Town of Ball v. Rapides Parish Police Jury,* 746 F.2d 1049, 1051 n. 1 (5th Cir. 1984). ASU argues, however, that since the Supreme Court has more recently determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690 (1977), they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

> The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amendable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir. 1980), *cert. denied,* 449 U.S. 1015 (1980).[4] We are bound by this decision, which ex-

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[3]By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. City of Oklahoma City v. Tuttle, _____ U.S. _____, 105 S.Ct. 2427, 2432 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

[4]*See also* Commonwealth of Pa. v. Porter, 659 F.2d 306, 327 n. 3 (3rd Cir 1981) (en banc) (standing recognized on other grounds): "[S]tates

tends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.[5]

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge, no court has decided this issue.[6] We conclude that no such right of action exists.

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were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

[5]Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory bussing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-488 n. 31.

We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers, supra,* at 1070. But *Seattle School District* does not trench on a state's political prerogatives. It simply holds that once a state's political organization is in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. *See Seattle School District, supra,* at 479-482.

[6]We note that at least five justices determined in University of California Regents v. Bakke, 438 U.S. 265, 287 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, it necessarily has no Title VI rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* at 281.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams,* 760 F.2d 1158, 1163-64 (11th Cir. 1985), *cert. denied sub nom. Grimmer v. Hardin,* 106 S.Ct. 530 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation.[7] Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our analysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.[8] Two exceptions to this rule apply: (1) a

[7] *See* Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1978).

[8] The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or

state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, ____ U.S. ____, 105 S.Ct. 3142, 3145 (1985). One further doctrine, first set out in *Ex Parte Young*, 209 U.S. 123 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. *See Kentucky v. Graham*, ____ U.S. ____, 105 S.Ct. 3099, 3106 n. 14 (1985).

The instant case does not fall under either of the first two exceptions. Alabama has not consented to suit under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham, supra*, at 3107 n. 17; *Quern v. Jordan*, 44 U.S. 332 (1979). Thus, the Knight intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action[9] grounded on federal law, parties may overcome the state's immunity by naming state officials as defendants. *Graham, supra*, at 3107 n. 18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its*

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equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Hans v. Louisiana, 134 U.S. 1 (1890), established that the amendment also proscribes suits by citizens against their own state.

[9]The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the *Young* exception applies similarly in both cases.

members, from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court had indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* at 3106 n. 14; *Brandon v. Holt,* 105 S.Ct. 873, 877 (1985).

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined despite the Eleventh Amendment bar. *See Monell, supra,* at 694.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the *Young* exception, we need not reach the difficult question of whether the Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman,* 569 F.2d 300, 302 (5th Cir. 1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellant did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This Court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio,* 691 F.2d 1344, 1353 (11th Cir. 1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ.P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose Foods, Inc. v. Teamsters,* 415 U.S. 423, 434 n. 7 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose,* the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its argument would have been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order

hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. *See, e.eg., Fernandez-Rogue v. Smith,* 671 F.2d 426, 429 (11th Cir. 1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner,* 343 F.2d 226, 229 (5th Cir. 1965). In short, we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing — particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO — is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial likelihood that they would prevail on the merits of the controversy.[10] Specifically, appellant challenges findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory, and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

[10]To secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. Johnson v. United States Department of Agriculture, 734 F.2d 774, 781 (11th Cir. 1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such an injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra,* at 302. *See also University of Texas v. Camenisch,* 451 U.S. 390, 395 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.,* 730 F.2d 1417, 1424 (11th Cir. 1984), *cert. denied sub nom. Windrush Partners v. Metro Fair Housing Services,* 105 S.Ct. 249 (1984). We accept as unchallenged the district court's factual conclusion that:

> [t]he total effect on the Board's nonapproval of most of ASU's teacher education programs if ieft unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be nonexistent.[11]

[11]The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted – that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude toward regulations duly adopted by the State Board of Education." Whether the

Given this finding by the lower court, which is entitled to substantial deference, *see Anderson v. City of Bessemer*, ____ U.S. ____, 105 S.Ct. 1504 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court — and this Court on review — to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substantial likelihood of success on the merits in the latter action, particularly since the judge, who had heard argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits, we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacities. We REVERSE the district court's entry of any injunction on behalf of ASU, or against the state Board itself.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominately black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimi-

Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

nation, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created institutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1, 15-16 (1971). If, in that event, in submitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.,* 769 F.2d 311 (5th Cir. 1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.